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Supreme Court of the United States

OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL., APPELLANTS,

vs.

EE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS

No. 185

EE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS, APPELLANTS,

vs.

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA; ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED JULY 1, 1954

PROBABLE JURISDICTION NOTED OCTOBER 18, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

INDEX

	Original	Print
Record from U.S.D.C. for the Western District of Oklahoma	a	1
Caption (omitted in printing)	a	
Complaint	1	1
Exhibit A—Excerpt from lease agreement between Zale Jewelry Company, Inc. and Dr. Oran Rips	16	14
Exhibit B—Excerpt from Enrolled House Bill 953	17	15
Exhibit C—Letter dated September 1, 1953 from Zale Jewelry Company to Dr. Oran Rips	18	17

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Record from U.S.D.C. for the Western District of Oklahoma—Continued	Original	Print
Temporary restraining order	20	18
Amended answer and counterclaim of the defendants	23	19
Plaintiffs' reply to defendants' counterclaim	30	23
Defendants' proposed judgment and decree	33	24
Judgment and decree	37	27
Defendants' petition for appeal	41	29
Order allowing appeal	43	30
Bond (omitted in printing)	45	
Citation (omitted in printing)	47	
Defendants' Assignment of errors and prayer for reversal	50	31
Statement required by paragraph 2, Rule 12 of the rules of Supreme Court (omitted in printing)	54	
Certificate of service and notice of appeal (omitted in printing)	112	
Plaintiffs' petition for appeal	115	33
Plaintiffs' Assignment of errors and prayer for reversal	117	34
Exhibit A—Letter dated March 13, 1954 from W. S. Farmer, O.D. to Fellow Optometrists (copy) (omitted in printing)	119	
Opinion, Wallace, J.	129	36
Partial dissenting opinion, Murrah, J.	155	62
Statement required by paragraph 2, Rule 12 of the rules of the Supreme Court (omitted in printing)	169	
Exhibit B—Enrolled House Bill No. 953 (copy) (omitted in printing)	171	
Praecipe (omitted in printing)	176	
Order allowing appeal	179	69
Bond (omitted in printing)	182	
Citation (omitted in printing)	185	
Certificate of service and notice of appeal (omitted in printing)	188	
Motion and order of plaintiffs to have original records transmitted to the Supreme Court (omitted in printing)	191	
Transcript of proceedings	196	70
Appearances	196	70
Opening statement by Mr. Woods on behalf of plaintiffs	200	71
Opening statement by Mr. Daugherty on behalf of defendants	208	76
Testimony of Dr. Tullos O. Coston	229	89
Allen D. Hill	269	114
Carl C. Barber	335	156
Colloquy between court and counsel	362	174

Record from U.S.D.C. for the Western District of Oklahoma—Continued	Original	Print
Statement by Mr. Woods	366	176
Colloquy between court and counsel	369	178
Testimony of Allen D. Hill (recalled)	390	196
Dr. Oran Rips	404	199
Dr. Ellis Carp	412	204
Colloquy between court and counsel	438	220
Testimony of Dr. Richard A. Clay	449	227
Dr. F. T. Staekpole	477	245
Colloquy between court and counsel	505	262
Reporters' certificate (omitted in printing)	511	
Deposition of Dr. Arthur M. Culler	514	266
Dr. Frederick C. Cordes	533	274
Exhibit 1—Letter dated May 11, 1953 from Oklahoma State Medical Association to Rep. Paul Harkey	596	308
Deposition of Dr. William L. Benedict	600	308
Dr. Alson Emmons Braley	658	337
Dr. Albert N. Lemoine, Jr.	713	366
Dr. Charles Sheard	776	402
Plaintiffs' Exhibits	885	459
No. 2—Letter dated March 13, 1953 from W. S. Farmer, O.D. to Fellow Optometrists	885	459
No. 14—Document, "Selected Examination Questions and Written Tests," given by the American Board of Opticianry, etc.	887	462
No. 15—Document, "Outlines and Syllabuses," American Board of Opticianry	893	468
No. 18—Prescription of C. W. McClure M.D. for Mrs. Warren Towe, dated January 10, 1952	899	477
No. 19—American Optical Company Prescription Service for L. J. Martin, Wichita, Kansas	900	478
Plaintiffs' Exhibits	900b	479
No. 20—Prescription of Dr. W. G. Gillett, et al. for Lloyd J. Martin dated September 12, 1951	900b	479
No. 21—Prescription for Duke Duvall of Tullos O. Coston, M. D. dated August 18, 1951	901	480
No. 22—Lease agreement between Zale Jewelry Company, Inc. and Dr. Oran Rips, June 17, 1953 (copy) (omitted in printing)	902	
No. 23—Letter dated September 1, 1953, from Zale Jewelry Company to Dr. Oran Rips (copy) (omitted in printing)	904	
No. 24—Request for admission of plaintiffs (omitted in printing)	905	
Praecipe of defendants (omitted in printing)	946	

	Original	Print
Record from U.S.D.C. for the Western District of Oklahoma—Continued		
Appellees' designation of additional matters to be included in the record (omitted in printing)	951	
Amendment of defendants to praecipe (omitted in printing)	954	
Clerk's certificate (omitted in printing)	956	
Statement of points to be relied upon, Case No. 184	958	481
Statement of points to be relied upon, Case No. 185	965	485
Order noting probable jurisdiction	972	487

[fol. a] [Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6062-Civil

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, dba Douglas Optical; and ORAN RIPS, Plaintiffs,

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma; G. O. Grant, County Attorney of Adair County, Oklahoma; Robert H. Balfour, County Attorney of Alfalfa County, Oklahoma; James L. Clark, County Attorney of Atoka County, Oklahoma; Gene H. Sharp, County Attorney of Beaver County, Oklahoma; C. A. Back, Jr., County Attorney of Beckham County, Oklahoma; W. A. Richardson, County Attorney of Blaine County, Oklahoma; R. H. Mills, County Attorney of Bryan County, Oklahoma; R. L. Lawrence, County Attorney of Caddo County, Oklahoma; James V. Phelps, County Attorney of Canadian County, Oklahoma; Alvin Bruce, County Attorney of Carter County, Oklahoma; Jack Bliss, County Attorney of Cherokee County, Oklahoma; Vester V. Songer, County Attorney of Choctaw County, Oklahoma; Hiram A. Butler, County Attorney of Cimarron County, Oklahoma; Hez J. Bussey, County Attorney of Cleveland County, Oklahoma; H. M. Shirley, County Attorney of Coal County, Oklahoma; Manville Redman, County Attorney of Comanche County, Oklahoma; Hugh F. Fitzsimmons, County Attorney of Cotton County; L. O. Thomas, County Attorney of Craig County, Oklahoma; Clyde Patrick, County Attorney of Creek County, Oklahoma; Fred E. LaRue, County Attorney of Custer County, Oklahoma; Don Hampton, County Attorney of Delaware County, Oklahoma; T. J.

Ruble, County Attorney of Dewey County, Oklahoma; L. H. Clark, County Attorney of Ellis County, Oklahoma; [fol. 2] Floyd Armstrong, County Attorney of Garfield County, Oklahoma; Raymond Burger, County Attorney of Garvin County, Oklahoma; Wilson Smithen, County Attorney of Grady County, Oklahoma; John M. Amick, County Attorney of Grant County, Oklahoma; Jack Sasseen, County Attorney of Greer County, Oklahoma; Raymond Berry, County Attorney of Harmon County, Oklahoma; Earl F. Camp, County Attorney of Harper County, Oklahoma; Nat Henderson, County Attorney of Haskell County, Oklahoma; C. A. Holland, County Attorney of Hughes County, Oklahoma; Ross Rutherford, County Attorney of Jackson County, Oklahoma; Dave K. Spradling, County Attorney of Jefferson County, Oklahoma; John J. Stobaugh, County Attorney of Johnston County, Oklahoma; Ned Looney, County Attorney of Kay County, Oklahoma; Karl D. Cunningham, County Attorney of Kingfisher County, Oklahoma; Lloyd Reeder, County Attorney of Kiowa County, Oklahoma; Wayne Russell, County Attorney of Latimer County, Oklahoma; Joseph W. Foster, County Attorney of LeFlore County, Oklahoma; Tom J. Amis, County Attorney of Lincoln County, Oklahoma; H. Dale Cook, County Attorney of Logan County, Oklahoma; Floyd Miller, Jr., County Attorney of Love County, Oklahoma; L. D. Harris, County Attorney of McClain County, Oklahoma; Bascom Coker, County Attorney of McCurtain County, Oklahoma; Clark Nichols, County Attorney of McIntosh County, Oklahoma; George Camp, County Attorney of Major County, Oklahoma; O. C. Barnes, County Attorney of Marshall County, Oklahoma; Lewis F. Grayson, County Attorney of Mayes County, Oklahoma; Millard Lowrance, County Attorney of Murray County, Oklahoma; Ernest Anthis, Jr., County Attorney of Muskogee County, Oklahoma; W. E. Rice, County Attorney of Noble County, Oklahoma; Hubert Marlow, County Attorney of Nowata County, Oklahoma; Hugh Coleman, County Attorney of Okfuskee County, Oklahoma; Edgar R. Boatman, County Attorney of Okmulgee County, Okla- [fol. 3] homa; R. Havens, County Attorney of Osage

County, Oklahoma; Robt. H. Reynolds, Jr., County Attorney of Ottawa County, Oklahoma; Lewis Raba, County Attorney of Pawnee County, Oklahoma; Robert M. Murphy, County Attorney of Payne County, Oklahoma; Homer W. Neece, County Attorney of Pittsburg County, Oklahoma; W. Barney Ward, County Attorney of Pontotoc County, Oklahoma; Lloyd J. Henry, County Attorney of Pottawatomie County, Oklahoma; Kenneth S. Lawson, County Attorney of Pushmataha County, Oklahoma; Leroy Vick, County Attorney of Roger Mills County, Oklahoma; H. P. Daugherty, County Attorney of Rogers County, Oklahoma; Tom Smith, County Attorney of Seminole County, Oklahoma; Frederick D. Green, County Attorney of Sequoyah County, Oklahoma; Clinton D. Dennis, County Attorney of Stephens County, Oklahoma; Dennis Reynolds, County Attorney of Texas County, Oklahoma; Alvin Boyd, County Attorney of Tillman County, Oklahoma; Thomas J. McGoldrick, County Attorney of Wagoner County, Oklahoma; Daniel Bassett, County Attorney of Washington County, Oklahoma; E. N. Sasseen, County Attorney of Washita County, Oklahoma; Hugh D. Potts, County Attorney of Woods County, Oklahoma; J. C. Bleckley, County Attorney of Woodward County, Oklahoma; Zales Jewelry Company, a corporation, Defendants.

[fol. 4] COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND OTHER RELIEF, AND APPLICATION FOR TEMPORARY RESTRAINING ORDER—Filed September 2, 1953

Plaintiffs for their claim for relief against defendants allege and state:

(1) This is an action for declaratory relief pursuant to the provisions of Sections 2201 and 2202 of the Judicial Code of the United States (28 U.S.C. 2201, 2202) and for injunctive relief against the enforcement of House Bill No. 953 (Title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma Statutes) pursuant to the provisions of Sections 2281 to 2284, inclusive, of the Judicial Code of the United States (28 U.S.C. 2281-2284).

(2) This action arises under the Constitution of the

United States, Article I, Section 8, and Article I, Section 10, the XIV Amendment to the Constitution of the United States, Section 1, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

(3) There is a present, actual, justiciable controversy between plaintiffs and defendants as will hereinafter more fully appear.

(4) Plaintiff Lee Optical of Oklahoma, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Oklahoma with its principal place of business in Oklahoma City, Oklahoma. Plaintiff, Oran Rips, is a citizen of the State of Oklahoma. Plaintiff, Ellis Carp, dba Douglas Optical, is a citizen of the State of Texas.

(5) Defendant, Mac Q. Williamson, is a citizen of the State of Oklahoma, residing in Oklahoma City, and is the duly elected, qualified and acting Attorney General of said State and as such is charged with the enforcement of the laws of said State. Defendants, Granville Scanland and Robert L. Wheeler, are citizens of the State of Oklahoma and are the duly elected, qualified and acting County Attorneys of Oklahoma and Tulsa Counties, Oklahoma, respectively, and are persons whose duty it is to prosecute plaintiffs for violation of House Bill No. 953 (Title 59, [fol. 5] Chapter 24, Sections 941-947, Oklahoma Statutes).

(6) Defendant, Zales Jewelry Company, is a corporation organized and existing under and by virtue of the laws of the State of Texas, and is engaged in retailing merchandise to the general public from establishments operated by it in Tulsa and Oklahoma City.

(7) All of the defendants named in the caption not heretofore specifically named and described in the body of the complaint are citizens of Oklahoma and duly elected, qualified and acting County Attorneys of the State of Oklahoma whose duty it is to enforce the laws in their respective counties and prosecute persons for violation of House Bill No. 953, and who, together with the aforesaid County Attorneys of Oklahoma and Tulsa Counties, comprise all of the County Attorneys of the seventy-seven Counties of the State of Oklahoma.

(8) Plaintiff, Lee Optical of Oklahoma, Inc., has its

principal place of business in Oklahoma City and is engaged in the business of advertising for sale and selling to the general public at retail eyeglasses, lenses, frames for eyeglasses, mountings, prisms and other optical appliances or devices and is also engaged in fitting, adjusting, adapting and applying lenses, frames, prisms and other optical appliances to the faces of persons, the duplicating, placing and replacing into frames of lenses and other optical appliances which have been prescribed, fitted or adjusted for visual correction or which are intended to aid human vision. It is what is known to the trade as a "dispensing" optician. Plaintiff, Ellis Carp d/b/a Douglas Optical, is likewise a "dispensing" optician engaged in the aforesaid activities.

(9) Plaintiff, Oran Rips, is a practicing physician in Tulsa, Oklahoma, duly licensed to practice as such by the Oklahoma State Board of Medical Examiners pursuant to the provisions of Title 59, Chapter 11, Oklahoma Statutes. At the present time, and for a number of years next preceding the filing of this complaint, plaintiff Oran Rips has specialized in the examination of eyes for glasses and for some time has maintained his office in the retail premises of defendant Zales Jewelry Company at 301 South Main, [fol. 6] Tulsa, Oklahoma, which space he occupies under a written lease dated June 17, 1953, in which lease the Zales Jewelry Company is lessor. A copy of said lease is attached hereto, marked Exhibit "A" and by such reference made a part hereof. Said plaintiff is not in the employ of any person, firm or corporation, but is engaged as an individual in the practice of his profession on his own behalf.

(10) At the 1953 Session of the Legislature of the State of Oklahoma there was enacted House Bill No. 953 (Title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma Statutes). Said law was approved by the Governor of Oklahoma on June 20, 1953, and by its terms is effective September 4, 1953. A true and complete copy of said law is attached hereto, marked Exhibit "B", and by such reference made a part hereof.

(11) Plaintiffs, Lee Optical of Oklahoma, Inc., and Ellis Carp, are neither licensed physicians nor licensed optome-

trists in the State of Oklahoma and do not purport to practice as such. For some time they have maintained and now maintain places of business in the State of Oklahoma from which they have sold and are now selling to the general public at retail eyeglasses containing lenses produced pursuant to prescriptions from oculists and optometrists duly licensed under the laws of the State of Oklahoma and other states of the United States, and have also sold and are now selling lenses, prisms, frames for eyeglasses and other optical goods. In the conduct of their respective businesses plaintiffs have also rendered and now render such services as the repair of broken eyeglasses and frames, the duplication of broken eyeglass lenses, the duplication of eyeglasses and the lenses contained therein, placing and replacing lenses in frames and fitting, adjusting, adapting and applying to the face lenses, frames, prisms and other optical appliances and other similar services. In connection with such services and the sale of such merchandise, said plaintiffs have customarily maintained and now maintain window displays of eyeglasses, frames, lenses and other optical goods and have advertised and now advertise such merchandise and the services in newspapers, magazines, by radio, television and by other media of publication.

[fol. 7] (13) Since the enactment of House Bill No. 953, the defendant Granville Scanland has advised plaintiff Lee Optical of Oklahoma, Inc., and defendant Robert L. Wheeler has advised plaintiff Ellis Carp, dba Douglas Optical, that commencing with September 4, 1953, the effective date of said law, said plaintiffs must cease and desist from:

> (a) Advertising by radio, newspaper, television, window displays or by any other means the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms, or any other optical appliances or devices, and
>
> (b) In any manner fitting, adjusting, adapting, or applying lenses, frames, prisms or other optical appliances to the face of any person, or duplicating or attempting to duplicate, or placing or replacing into frames, any lenses or other optical appliances which

have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision, unless in each instance each such act has been authorized by a prescription written by an oculist or optometrist licensed under the laws of Oklahoma. Said defendants have further threatened said plaintiffs with prosecution under Section 6 of said act (59 O.S. 946) [fol. 8] and 21 O.S. 10, they immediately cease and desist from engaging in each and every one of the aforesaid acts and practices. Defendant Mac Q. Williamson, as Attorney General of the State of Oklahoma, has also advised said plaintiffs that unless they immediately cease and desist from the above practices that said plaintiff will be subject to criminal prosecution under said laws.

Defendant Zales Jewelry Company has served written notice upon plaintiff Oran Rips that his lease of space in the retail premises at 301 South Main, Tulsa, Oklahoma, would be terminated on September 4, 1953, by virtue of the provisions of Section 4 of said House Bill 953 (59 O.S. 944), providing that no person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments or otherwise permit any person purporting to do eye examination or give visual care to occupy space in said retail store. A true copy of said notice of termination is attached hereto marked Exhibit "C" and by such reference made a part hereof.

(15) The fitting, adjusting, adapting or applying of lenses, frames, prisms and other optical appliances to the face of a person, and the duplicating, placing or replacing into frames of lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction or which are intended to aid human vision, involves only the application of manual dexterity, good judgment and commonly known physical principles and the employment of workmanship and skill of no greater degree than are regularly employed in semi-skilled trades. They do not involve the use or application of medical or scientific knowledge, learning, skill or extraordinary experience.

Except for the performance of such services as are defined in Section 581, Chapter 13, and Section 492, Chapter 11, Title 59, Oklahoma Statutes, and the issuance of a prescription for lenses in accordance therewith, all other acts and things done in connection with the preparation, fitting and sale of eyeglasses, lenses, frames, mountings, prisms, or other optical appliances and devices constitute commercial business are not customarily performed by oculists [fol. 9] or by optometrists excepting only optometrists who maintain retail merchandising establishments and manufacturing plants for the doing thereof. Such acts and things have no greater relation to the public health, morals, safety and general welfare than any other business involving the sale of standard commercial articles or services.

(16) The economic history of the profession of optometry has demonstrated the persistent and aggressive interest of the members thereof in the preemption to themselves of the profits resulting from the sale of merchandise connected with visual aid or correction. Contrary to the development and objectives of other professions which have sedulously avoided any merchantile advantage from their practice, optometrists have embraced the mercantile opportunities afforded by their practice with the result that in the State of Oklahoma and elsewhere great numbers of optometrists conduct their practice amid their own retail merchandising establishments, fixtures, equipment and stock in trade in prime retail locations. The preoccupation of optometrists with the commercial opportunities in optical goods has induced them to engage in militant legislative programs in the State of Oklahoma and throughout the United Sates, which under the guise of the promotion of professional ethics have increasingly enhanced their commercial, competitive position in the sale of optical goods and appliances. House Bill No. 953 is of such a character and was sponsored solely by the Association of Oklahoma Optometrists and its lobbyists, and not by the public in general nor even by the Medical Association of the State of Oklahoma, but rather is a law designed by licensed optometrists to eliminate competitors in the sale of eyeglasses and other optical goods and services and de-

prive the public, by prohibiting normal competitive advertising, of knowledge of the fair retail value of such optical goods and services.

(17) Said House Bill No. 953 is unconstitutional and void under the Constitution of the United States and Amendments thereto for the following reasons:

(a) Said statute deprives plaintiffs of their liberty and property without due process of law in violation of the XIV Amendment to the Constitution of the United States, Section 1, in that it:

[fol. 10] (i) Purports to make unlawful and criminal fitting, adjusting, adapting, applying, of lenses, frames, prisms or other optical appliances to the face of any person, duplicating or attempting to duplicate, placing or replacing into frames, lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction or which are in aid of human vision, by plaintiffs or any person except in each instance pursuant to a written prescription issued by a physical or optometrist licensed under the laws of the State of Oklahoma.

(ii) Purports to make unlawful and criminal the solicitation of the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms, or any other optical appliances or devices by radio, window display, television, newspaper, or any other means of advertisement.

(iii) Purports to make it unlawful and criminal for any person, firm or corporation engaged in the business of retailing merchandise to the general public to rent space, sublease departments or otherwise permit any person performing eye examinations or giving visual care, to occupy space in such retail store.

(iv) Purports to make unlawful and criminal the fitting, adjusting, adapting or applying of lenses, frames, prisms and other optical appliances to the face of a person, thereby having the effect of prohibiting the sale thereof except upon prescription,

when, in fact, prescriptions for such merchandise and services are impracticable and unknown to any trade or profession, and physicians and optometrists licensed under the laws of Oklahoma have no special training or skill in the sale of such merchandise or the rendering of such services.

(b) Said statute impairs the obligation of contracts in violation of Article I, Section 10, of the Constitution of the United States, in that it purports to make unlawful any lease, sublease or occupancy of space by a [fol. 11] retail merchandiser in its retail store to a person purporting to perform eye examinations or give visual care.

(c) Said statute places an undue and unreasonable burden and restraint on interstate commerce in violation of Article I, Section 8, of the United States Constitution, in that it has the effect of prohibiting plaintiffs, except pursuant to prescription, from selling eyeglasses, lenses, spectacles, frames, mountings, prisms or other optical appliances or devices purchased and received by plaintiffs through the channels of interstate commerce, and from selling such eyeglasses, spectacles, lenses, frames, mountings, prisms and other optical appliances or devices in aid of human vision from their Oklahoma stores through the channels of interstate commerce to persons residing outside the State of Oklahoma.

(d) Such statute places an undue and unreasonable burden and restraint on interstate commerce in violation of Article I, Section 8, of the United States Constitution in that it restricts and prohibits the advertising of standard commercial merchandise in newspapers, magazines, over the radio, by television and other means of interstate communication.

(e) Said statute deprives plaintiffs of the equal protection of the laws guaranteed to them by Article I of the XIV Amendment to the Constitution of the United States in that it:

(i) By restricting the legal right to sell eyeglasses, spectacles, lenses, frames, mountings, prisms

and other optical appliances or devices in aid of human vision except upon written prescription from physicians and optometrists licensed under Oklahoma law, it has the effect of preempting to and monopolizing in such physicians and optometrists the sale of such standard commercial merchandise and services to the exclusion of plaintiffs and other persons similarly situated.

(ii) Singles out and prohibits the advertising for sale by any means of eyeglasses, spectacles, lenses, [fol. 12] frames, mountings, prisms and other optical appliances and devices in aid of human vision, although the advertisement of other standard merchandise is not prohibited by Oklahoma law and other prosthetic devices for the aid of defects in the human body, such as hearing aids and trusses may be advertised for sale under Section 736.1. Chapter 16, Title 59, Oklahoma Statutes.

(iii) By restricting the legal right to sell eyeglasses, spectacles, lenses, frames, mountings, prisms and other optical appliances or devices in aid of human vision except upon written prescription from physicians and optometrists licensed under Oklahoma law, when no restriction is placed upon the sale of ready-to-wear glasses equipped with convex-spherical lenses or sun-glasses equipped with plano lenses or industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

(iv) Has the effect of placing control of, preempting to and monopolizing in physicians and optometrists licensed under the laws of the State of Oklahoma, all trade and commerce in the foregoing merchandise and services, when, in fact, such control, preemption and monopolization has no reasonable relation to the public health, safety, morals or general welfare.

(f) Said statute contravenes the due process clause of the XIV Amendment to the Constitution of the United States in that:

(i) Although purporting to make violations of said statute a criminal offense, certain of its language and provisions are so vague, indefinite and ambiguous that neither plaintiffs nor other persons similarly situated are able to determine which acts on their part are prohibited by said statute.

(ii) It denies, impairs and disparages the inherent right of plaintiffs to contract in matters of private [fol. 13] concern in which the public at large and the public welfare, peace, health and safety are not concerned or involved.

(iii) It deprives plaintiffs of their inherent right to liberty and the pursuit of happiness and the enjoyment of the fruits of their own industry.

(iv) It has the effect of placing control of, preempting to and monopolizing in physicians and optometrists licensed under the laws of the State of Oklahoma, all trade and commerce in the aforesaid optical merchandise and services when, in fact, such control, preemption and monopolization has no reasonable relation to the public health, safety, morals or general welfare.

(v) Deprives plaintiffs of their right of free speech in prohibiting advertising of optical goods and appliances.

For all of said reasons said House Bill No. 953 is void and unconstitutional under the United States Constitution and Amendments thereto.

(18) The annual net profits of plaintiff Lee Optical of Oklahoma, Inc., in the State of Oklahoma exceeds $5,000.00, while those of plaintiff Ellis Carp are in excess of $15,000.00. The value of plaintiff Oran Rips' lease from defendant Zales Jewelry Company is at least $10,000.00. The enforcement of House Bill No. 953 by defendants Granville Scanland and Robert L. Wheeler and by other

County Attorneys in the State of Oklahoma will subject plaintiffs and each of them to unusual hardship, immediate and irreparable injury and damage for which there exists no adequate relief at law, and such enforcement unless enjoined, will cause plaintiff Lee Optical of Oklahoma, Inc., to suffer losses of at least $100.00 per day, and plaintiff Ellis Carp of $125.00 per day and will deprive plaintiff Oran Rips of all income from an established and profitable practice of his profession, to his damage in excess of $10,000.00 per annum. Unless the Court forthwith issue without notice and hearing a temporary restraining order against the defendants, plaintiffs will suffer the aforesaid immediate irreparable injury and damage, and will be subjected to arrest and criminal prosecution under said statute.

Wherefore, plaintiffs pray that this Court:

[fol 14] (1) Declare and determine said House Bill No. 953 (title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma Statutes) unconstitutional and void under the Constitution of the United States and Section 1 of the XIV Amendment thereto.

(2) Enjoin defendants Granville Scanland, Robert L. Wheeler and Mac Q. Williamson and the remaining defendant County Attorneys, their agents, servants, representatives, attorneys and all other persons in concert with them, from enforcing or attempting to enforce said statute.

(3) Enjoin defendant Zales Jewelry Company from terminating or in any way cancelling its said lease to plaintiff Oran Rips.

(4) Issue a temporary restraining order, forthwith, without notice and hearing, pending the final hearing and determination of this cause upon its merits, restraining the defendants, Granville Scanland, Robert L. Wheeler and Mac Q. Williamson, or each of them, their agents, employees, representatives, attorneys and all other persons in concert with them, from enforcing or attempting to enforce said statute, and restraining defendant Zales Jewelry Company from terminating or in any way cancelling its said lease to plaintiff Oran Rips.

(5) Grant plaintiffs such other and further relief as may be just and requitable.

Dudley, Duvall & Dudley, By Duke Duvall, 1501 Liberty Bank Building, Oklahoma City, Oklahoma. [fol. 15] Stinson, Mag, Thomson, McEvers & Fizzell, By John M. Phillips, Attorneys for Plaintiffs.

Duly sworn to by T. Shanbaum. Jurat omitted in printing.

[fol. 16] EXHIBIT "A" TO COMPLAINT

Lease Agreement

This agreement, made and entered into by and between: Zale Jewelry Company, Inc., a corporation, party of the first part, hereinafter known as "lessor" and Dr. Oran Rips, party of the second part, hereinafter known as "Lessee" witnesseth: whereas, the Lessor has the occupancy of a building known as 301 S. Main in Tulsa, Oklahoma, and whereas, Lessee desires to rent space in said building, now, therefore, in consideration of the mutual covenants, promises and agreements herein contained, Parties stipulate and agree as follows, to-wit;

1. Lessor does hereby lease to the Lessee a room on the balcony of the building at 301 S. Main in Tulsa, Oklahoma, of the approximate size of 7′ x 15′ to be used by Lessee as an office, together with a waiting room adjacent thereto of the approximate size of 8′ x 10′.

2. Said lease shall commence on the 17th day of June, 1953, and shall expire at midnight on the last day of March, 1956.

3. Lessee agrees to pay as rental for said space, the sum of One Hundred Dollars ($100.00) per month, payable on the 1st day of each month in advance. The rental from June 17, 1953, to July 1, 1953, shall be on a pro-rated basis.

4. Lessee agrees to not engage in any business in competition with the business of the Lessor conducted on said

premises. Lessee is not to engage in the sale of any merchandise, and shall operate independent of the operation of the business of the Lessor.

5. In the event Lessee fails to make payments of rent, as herein provided, or otherwise violates the terms of this Lease, Lessee agrees to give immediate possession of said premises, and failure on his part to do so, shall enable the Lessor to take such action as the law provides to terminate said Lease and termination of possession of said premises.

[fol. 17] EXHIBIT "B" TO COMPLAINT

AN ACT

Enrolled House Bill No. 953

By: Harkey (McCurtain), Ham, Sandlin, Welch (McCurtain), Vandiver, of the House, and Collins, Hope, Cooper, Cowden, Price and Field, of the Senate.

An act relating to visual care; defining terms; prohibiting dishonest and dangerous practices in the sale of optical goods and devices; prohibiting discrimination; making the act cumulative to other laws; making violation a misdemeanor authorizing injunction against violators.

Be it enacted by the people of the State of Oklahoma:

Section 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another.

Section 2. It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951, to fit, adjust, adapt, or to in manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt

to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designated to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951 may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses.

Section 3. It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms, or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction. Provided, however, that the provisions of this Act shall not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor of said commodity or material; nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act shall prohibit the sale of ready-to-wear glasses

equipped with convexspherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

Section 4. It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction to receive or accept any rebate, kick-back, reward or premium from any optical company or any other person, firm or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes. It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization, group or lay person and it shall be likewise unlawful for any corporation, lay body, organization, group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of a person licensed under the provisions of Chapter 11 or 13 of Title 59, Oklahoma Statutes 1951, provided that this sentence shall not apply to the University of Oklahoma School of Medicine and Hospitals, or —— ——.

[fol. 18] EXHIBIT "C" TO COMPLAINT

September 1, 1953.

Dr. Oran Rips,
301 South Main,
Tulsa, Oklahoma.

Dear Dr. Rips:

We sincerely regret that by virtue the provisions of House Bill #953 recently adopted by the Oklahoma Legislature,

we are prohibited from leasing space in our retail store to any person performing eye examinations or giving visual care.

Since the lease agreement covering the letting of your office space within our store has thus been unlawful, we are compelled to notify you, effective September 4, 1953, the effective date of House Bill #953, we must terminate your lease of this space, and we hereby request that on such date you surrender such space to this company.

Very truly yours, Zale Jewelry Company, Ben A. Lipshy, Treasurer.

BAL:mb.

[fol. 19] [File endorsement omitted.]

[fol. 20] In the United States District Court

[Title omitted]

Temporary Restraining Order—Filed September 2, 1953

This cause came on to be heard on the 2nd day of September, 1953, and it appearing to the Court that defendants are about to commit the acts hereinafter referred to and that they will do so unless restrained by order of this Court, and that immediate and irreparable injury, loss and damage will result to plaintiffs before notice can be served and a hearing had on plaintiffs' motion for a preliminary injunction, in that plaintiffs will be subject to arrest and criminal prosecution, and to extensive loss of business as set forth in the complaint in detail, in a substantial amount,

It is ordered that defendants, their agents, servants, employees, assistants, deputies and attorneys and all persons in active concert and participation with them, be and they are hereby restrained from enforcing or attempting to enforce House Bill No. 953 (Oklahoma Session Laws [fol. 21] 1953, Title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma Statutes), excepting the defendant Zales

Jewelry Company, and that such defendant be restrained from terminating or in any way cancelling its lease to plaintiff Oran Rips; provided that plaintiffs first give security in the sum of $1,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, such bond to be approved by the Court or by the Clerk of the Court.

It is further ordered that this order expire within 30 days after entry, unless within such time the order for good cause shown is extended for a like period, or unless the defendants consent that it may be extended for a longer period.

It is further ordered that plaintiffs' motion for a preliminary injunction be set down for hearing on the 30th day of September, 1953, at Ten A. M.

Issued at 3:30 P.M., September 2, 1953.

W. R. Wallace, United States District Judge.

[fol. 22] [File endorsement omitted.]

[fol. 23] In the United States District Court

[Title omitted]

Amended Answer and Counterclaim of the Defendant, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the Defendant County Attorneys Herein—Filed October 30, 1953

Answer

Come now the defendant, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the defendant county attorneys herein, and in answer to the complaint filed in the above cause allege and state:

1. The complaint fails to state a claim against defendants upon which relief can be granted.

2. Defendants admit the material allegations of fact and of law set forth in Paragraphs 1 to 3 of the complaint, and specifically admit that "There is a present, actual, justiciable controversy between plaintiffs and defendants," but deny that House Bill No. 953 (59 Okl. St. Ann. §§ 941 to 947), referred to in the complaint, violates the constitutional provisions mentioned therein, and allege that said house bill is constitutional and valid in all respects and was enacted as a proper exercise of the police power of the state in the interest of the public health and welfare.

[fol. 24] 3. Defendants admit the material allegations of fact set forth in Paragraph 4 of the complaint, and allege that "Lee Optical of Oklahoma, Inc.," was incorporated under and by virtue of the laws of the State of Oklahoma on June 24, 1953.

4. Defendants admit the material allegations of fact set forth in Paragraphs 5, 6 and 7 of the complaint.

5. Defendants admit the material allegations of fact set forth in Paragraph 8 of the complaint, but allege that the acts of Lee Optical of Oklahoma, Inc., and Eliis Carp, d/b/a Douglas Optical, as set forth in said paragraph

(1) in so far as said acts include

(a) the measuring, adapting, fitting, preparing, dispensing, or adjusting of lenses, spectacles, eyeglasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomolies of the human eye, without a written prescription, or its duplicate, such as is provided for in Section 2 of said house bill, or

(b) the duplicating or attempting to duplicate, or the placing or replacing into frames, of any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision, without having the prescription, or duplicate thereof, in which the prescribed lenses or other optical appliances were so prescribed, or

(c) the giving of treatment or training designed to aid human vision, or

(d) the representing or holding themselves out to the public as being qualified to do any of the acts above mentioned in Subparagraphs (a), (b) or (c), [fol. 25] violate the provisions of said House Bill No. 953 and/or Chapters 11 and 13 of Title 59, Oklahoma Statutes 1951, and

(2) in so far as said acts include

(a) the solicitation of "the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms or any other optical appliances or devices [for visual care or correction], eye examinations or visual services, by radio, window display, television, telephone directory, display advertisement, or by any other means of advertisement," or

(b) the use of "any other method or means of baiting, persuading or enticing the public into buying spectacles, eyeglasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction,"

violate the provisions of House Bill No. 953.

6. Defendants neither admit nor deny the material allegations of fact set forth in Paragraph 9 of the complaint relating to the plaintiff, Oran Rips, and to the defendant, "Zales Jewelry Company," and allege that defendants have no information relating thereto.

7. Defendants admit the material allegations of fact set forth in Paragraph 10 of the complaint, with the exception of that part which states that House Bill No. 953 "by its terms is effective September 4, 1953," and allege that said bill did not become effective until September 5, 1953.

8. Defendants admit the material allegations of fact set forth in Paragraph 11 of the complaint, but allege that the acts of Lee Optical of Oklahoma, Inc., and Ellis Carp, d/b/a Douglas Optical, as set forth in said paragraph, in so far as same include acts, such as are referred to [fol. 26] in Subparagraphs 1 and 2 of Paragraph 5 hereof, violate the provisions of House Bill No. 953 and/or Chapters 11 and 13 of Title 59, Oklahoma Statutes 1951.

9. In relation to the material allegations of fact set forth in Paragraph 13 of the complaint, defendants admit and

allege that the county attorneys of Oklahoma intend to enforce the provisions of House Bill No. 953, and that the Attorney General of Oklahoma intends to advise all persons violating said bill that they are subject to criminal prosecution.

10. Defendants neither admit nor deny the material allegations of fact set forth in Paragraph 14 of the complaint relating to the defendant, "Zales Jewelry Company," and to the plaintiff, "Oran Rips," and allege defendants have no information relating thereto.

11. Defendants deny the material allegations of fact, if any, as well as the conclusions of law set forth in Paragraphs 15 and 17 of the complaint.

12. Defendants neither admit nor deny the material allegations of fact set forth in Paragraph 18 of the complaint and allege that they have no information relating thereto, but deny the conclusions of law set forth therein.

Wherefore, premises considered, defendants respectfully ask the court to decline to declare and determine House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature to be unconstitutional and void, as prayed for in the complaint, but on the other hand to hold the same constitutional and valid; to also decline to issue the writ of injunction prayed for therein as against these defendants, to vacate the temporary restraining order heretofore issued against defendants, to tax the cost of this action against plaintiffs, and to grant defendants such other and further relief as the court may deem just and proper.

[fol. 27] COUNTERCLAIM

For counterclaim against the above plaintiffs, these defendants adopt and incorporate herein the allegations of their foregoing answer and the admitted allegations of the complaint, and allege that House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941 to 947) is a valid and constitutional statute of the State of Oklahoma enacted as a proper exercise of the police power of the state in the interest of public health and welfare, and further allege that plaintiffs are now and

have been violating the provisions of said house bill and unless enjoined by this court will continue to do so.

Wherefore, these defendants respectfully ask the court for an order declaring House Bill No. 953 to be valid and constitutional in all respects, and that the court issue its order permanently enjoining plaintiffs from future violations of the provisions of said house bill.

Mac Q. Williamson, Attorney General of Oklahoma,
Fred Hansen, First Assistant Attorney General,
James C. Harkin, Assistant Attorney General.
Fred Daugherty, Paul Harkey, Leroy Powers, Attorneys for defendants.

[fol. 28] *Duly sworn to by Mac Q. Williamson. Jurat omitted in printing.*

[fol. 29] [File endorsement omitted.]

[fol. 30] In The United States District Court

[Title omitted]

Plaintiffs' Reply to Defendants' Counterclaim—Filed October 26, 1953

Plaintiffs, for their reply to defendants' counterclaim, deny the allegations thereof for the reasons set forth in their complaint.

Dudley, Duvall & Dudley, By Duke Duvall; Stinson, Mag, Thomson, McEvers & Fizzell, By Dick H. Woods, John M. Phillips, Attorneys for Plaintiffs.

[fol. 31] Certificate of Service—(Omitted in printing)

[fols. 32-32a] [File endorsement omitted.]

[fol. 33] IN THE UNITED STATES DISTRICT COURT

No. 6002 Civil

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, dba Douglas Optical; and Oran Rips, Plaintiffs,

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma; et al., Defendants.

DEFENDANTS' PROPOSED JUDGMENT AND DECREE—Filed March 16, 1954

This cause having come on for further and final hearing, and the issues therein having been tried before the court without a jury, and the court having heard the evidence and argument of counsel, having examined the pleadings and trial briefs, and having on March 1, 1954 rendered its written opinion in this cause, upon due consideration is of the opinion that the plaintiffs, Lee Optical of Oklahoma, Inc., a corporation, Ellis Carp, dba Douglas Optical, and Oran Rips, as well as the defendants, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the defendant county attorneys, are entitled to certain of the declaratory and injunctive relief respectively prayed for in the complaint and in the amended answer and counterclaim filed herein:

it is, therefore, adjudged and declared:

(1) That Sections 2, 3 and 4 of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941 to 947) are unconstitutional and void under the Constitution of the United States and Section 1 of the XIV Amendment thereto in the following particulars, to-wit:

[fol. 34] (a) Those portions of Section 2, which make it "unlawful for any person, firm, corporation, company or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59,

Oklahoma Statutes 1951, to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of such a licensee.

(b) That portion of Section 3 which makes it unlawful "to solicit the sale of * * * frames, mountings, * * * or any other optical appliances."

(c) That portion of Section 4 which provides that: "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sub-lease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store."

(2) That said House Bill No. 953 is constitutional and valid in all respects other than as set forth in Subparagraphs (a), (b) and (c) of Paraagraph (1), supra.

It is further ordered, adjudged and decreed:

(1) That the temporary restraining order entered in this cause on September 2, 1953, be and the same is hereby made permanent and perpetual against the defendants, Mac Q. Williamson, Granville Scanland, Robert L. Wheeler, and the remaining defendants who are county attorneys in the State of Oklahoma, their agents, servants, employees, assistants, deputies and attorneys and all persons in active concert and participation with them, in so far as it restrains them from enforcing or attempting to enforce against the plaintiffs the provisions of House Bill No. 953 (59 Okl. St. Ann. §§ 941 to 947) declared and adjudged unconstitutional and void herein, and they are hereby permanently enjoined from doing so.

(2) The temporary restraining order is further made permanent and perpetual against the defendant, the

Zales Jewelry Company, a corporation, in so far as the [fol. 35] same restrains the said defendant from cancelling or terminating its lease to plaintiff Rips on the ground of violation of the provisions of House Bill No. 953 (59 Okl. St. Ann. §§ 941 to 947) declared and adjudged unconstitutional and void herein, and it is hereby permanently enjoined from doing so.

(3) That the plaintiffs, Lee Optical of Oklahoma, Inc., a corporation, and Ellis Carp, dba Douglas Optical, and each of them, be and the same are hereby permanently and perpetually enjoined and restrained from violating any of the provisions of Section 3 or Section 4 of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 943 and 944) which:

(a) Make it unlawful for any person, firm, company, corporation, or partnership "to solicit the sale of spectacles, eye glasses, lenses, * * * prisms, * * * by radio, window display, television, telephone directory display advertising, or by any other means of advertisement"; or

(b) Make it unlawful for any person, firm, company, corporation, or partnership "to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction"; or

(c) Make it unlawful for any corporation, lay body, organization, group, or lay person "in any manner to make an eye examination or perform any visual correction through the means of engaging the services, on a salary, commission, or any other compensatory basis, of a person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951."

It is further ordered, adjudged and decreed that the costs of this proceeding be taxed as follows: To the plaintiff, Lee Optical of Oklahoma, Inc., a corporation, one-fourth; to the plaintiff, Ellis Carp, dba Douglas Optical, one-fourth; to the defendant, Zales Jewelry Company, one-fourth; and

to the defendant, Attorney General and county attorneys, one-fourth.

Dated at Oklahoma City, Oklahoma, this —— day of March, 1954.

—— ——, Judge.

[fol. 36] [File endorsement omitted.]

[fol. 37] IN THE UNITED STATES DISTRICT COURT

No. 6002 Civil

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, dba Douglas Optical; and Oran Rips, Plaintiffs,

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., Defendants.

Before Murrah, Circuit Judge, and Vaught and Wallace, District Judge

JUDGMENT AND DECREE—Filed March 29, 1954

This cause having come on for further and final hearing, and the issues therein having been tried before the Court without a jury, and the evidence of all of the parties hereto having been heard, and the cause having been argued and briefed by counsel, and the Court after being fully advised, having heretofore filed its written opinion herein, which opinion constitutes the Court's findings of fact and conclusions of law,

Now it is this date declared, ordered, adjudged, and decreed as follows:

(1) That the following portions of House Bill No. 953 (Title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma [fol. 38] Statutes) are unconstitutional and void, to-wit:

(a) Those portions of Section 2 (Title 59, Chapter 24, Section 942, Oklahoma Statutes), which makes it

unlawful for any person not a licensed optometrist or ophthalmologist "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the fact of a person . . ." or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision . . ." except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist;

(b) That portion of Section 3 (Title 59, Chapter 24, Section 943, Oklahoma Statutes), which makes it unlawful "to solicit the sale of . . . frames, mountings . . . or any other optical appliances";

(c) That portion of Section 4 (Title 59, Chapter 24, Section 944, Oklahoma Statutes), which provides that "No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sub-lease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store".

[fol. 39] (2) That the temporary restraining order entered in this cause on September 2, 1953, be and the same is hereby made permanent and perpetual against the defendants Mac Q. Williamson, Granville Scanland, Robert L. Wheeler, and the remaining defendants who are county attorneys in the State of Oklahoma, their agents, servants, employees, assistants, deputies and attorneys and all persons in active concert and participation with them, insofar as it restrains them from enforcing or attempting to enforce against the plaintiffs the provisions of House Bill 953 (Title 59, Chapter 24, Sections 941-947, Oklahoma Statutes) declared and adjudged unconstitutional and void herein, and they are hereby permanently enjoined from doing so.

(3) The temporary restraining order is further made permanent and perpetual against the defendant Zales Jewelry Company, a corporation, insofar as the same restrains the said defendant from cancelling or terminating its lease to plaintiff Rips on the ground of violation of the provisions of House Bill 953 (Title 59, Chapter 24, Sections 941-947, Oklahoma Statutes), declared and adjudged uncon-

stitutional and void herein, and it is hereby permanently enjoined from doing so.

(4) The plaintiffs and their surety are forever discharged and released from any and all liability by reason of their restraining or injunction bond given in this cause and the same is for naught held.

(5) The counterclaim of the defendant county attorneys and attorney general is held in abeyance, but jurisdiction of this cause is retained for the purpose of giving full effect to this judgment and for the purpose of making such further and other orders and decrees, or taking such further action, if any, as may become necessary or appropriate to carry out [fol. 40] and enforce the Court's judgment.

(6) The costs of this action are hereby assessed against the defendant county attorneys and attorney general.

Dated at Oklahoma City, Oklahoma, this 29 day of March, 1954.

W. R. Wallace, Judge; Edgar S. Vaught, Judge.

[File endorsement omitted.]

[fol. 41] In the United States District Court

[Title omitted]

Petition for Appeal—Filed May 17, 1954

Considering themselves aggri-ved by the final judgment and decree of this court, entered and filed on March 29, 1954, the defendants herein, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys of the State of Oklahoma, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final judgment and decree, and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said defendants; and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based, duly authenti-

cated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, Mac Q. Williamson, Attorney General of Oklahoma; Fred Hansen, First Assistant Attorney General, Attorneys for Defendants-Appellants.

[fol. 42] [File endorsement omitted.]

[fol. 43] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 17, 1954

Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys of the State of Oklahoma, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this court in this cause, entered and filed on March 29, 1954, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be, and the same is hereby, allowed as prayed for.

It is further ordered that the amount of the appeal bond be, and the same is hereby, fixed in the sum of Five-hundred ($500.00) Dollars with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

W. R. Wallace, District Judge; Alfred P. Murrah, Circuit Judge; Edgar S. Vaught, District Judge.

May 17th, 1954.

[fol. 44] [File endorsement omitted.]

[fols. 45-46] Bond on Appeal for $500.00 approved and filed May 17, 1954 omitted in printing.

[fols. 47-49] Citation in usual form showing service omitted in printing.

[fol. 50] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed May 17, 1954

Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys of Oklahoma, defendants in the above entitled cause, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment and decree of the United States District Court entered and filed on March 29, 1954.

The United States District Court erred:

1. In holding that the following portions of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947)are unconstitutional and void:

> Those portions of Section 2 (59 Okl. St. Ann. § 942) which make it unlawful for any person not a licensed optometrist or ophthalmologist "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted [fol. 51] or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of an Oklahoma licensed ophthamologist or optometrist;

2. In holding that the following portion of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) are unconstitutional and void:

> That portion of Section 3 (59 Okl. St. Ann. § 943), which makes it unlawful "to solicit the sale of * * * frames, mountings * * * or any other optical appliances";

3. In holding that the following portions of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) are unconstitutional and void:

> That portion of Section 4 (59 Okl. St. Ann. § 944), which provides that "No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sub-lease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store."

4. In permanently enjoining the defendants, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys of the State of Oklahoma from enforcing or attempting to enforce against the plaintiffs the provisions of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) declared and adjudged unconstitutional and void as above set forth.

5. In permanently enjoining the defendant, Zale's Jewelry Company, a corporation, from cancelling or terminating its lease to the plaintiff, Oran Rips, on the ground of violation of the provisions of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) declared and adjudged unconstitutional and void as above set forth.

[fol. 52] 6. In holding in abeyance the counter-claim of the defendants, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys, and failing to declare the remaining portions of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) to be constitutional and

valid and enjoining the plaintiffs from violating the provisions of the same.

Wherefore, the defendants above named pray that final judgment and decree of the United States District Court be reversed and House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) be declared and adjudged to be constitutional and valid in all of its provisions, and plaintiffs be enjoined from violating any of the provisions of same, and for such other relief as the court may deem fit and proper.

Mac Q. Williamson, Attorney General of Oklahoma;
Fred Hansen, First Assistant Attorney General,
Attorneys for Defendants-Appellants.

[fol. 53] [File endorsement omitted.]

[fols. 54-56] Statement Required by Paragraph Two, Rule Twelve of the Rules of the Supreme Court of the United States (omitted in printing)

[fols. 57-114] Certificate of Service and Notice of Appeal—(omitted in printing)

[fol. 115] In the United States District Court

[Title omitted]

Petition for Appeal—May 25, 1954

Lee Optical Company of Oklahoma, Inc. and Ellis Carp, plaintiffs in the above-entitled cause, considering themselves aggrieved by the final judgment and decree of this Court entered on the 29th day of March, 1954, do hereby pray an appeal from said final judgment and decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, plaintiffs present to

this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein plaintiffs consider the judgment erroneous are set forth in the Assignment of Errors and Prayer for Reversal accompanying this petition and to which reference is hereby made.

Plaintiffs pray that their appeal may be allowed; that citation be issued in accordance with law; that an order be [fol. 116] made with respect to the appeal bond to be given by said plaintiffs; that a transcript of the record, proceedings and documents upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules of said Court in such cases made and provided.

Dated May 25, 1954.

Duke Duvall, 1501 Liberty Bank Building, Oklahoma City 2, Oklahoma; John M. Phillips, Dick H. Woods, Nine West Tenth Street, Kansas City 5, Missouri, Attorneys for Plaintiffs.

[fol. 117] In the United States District Court

[Title omitted]

Assignment of Errors and Prayer for Reversal—May 25, 1954

Plaintiffs, Lee Optical of Oklahoma, Inc. and Ellis Carp, in connection with their Petition for Appeal to the Supreme Court of the United States, hereby assign error to the record and proceedings and the entry of the final judgment and decree in the District Court on March 29th, 1954, in the above-entitled cause and state that in the entry of the final judgment and decree the District Court committed error to the prejudice of plaintiffs in the following particulars:

1. The Court erred in failing to find and declare that the portion of Section 3 of House Bill No. 953 (59 Okl. St. Ann. § 943) that makes it unlawful for any person "* * * to

solicit the sale of spectacles, eyeglasses, lenses * * * prisms * * * by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; * * *" violates Article I, Section 8, of the Constitution of the United States and the "equal protec-[fol. 118] tion" and "due process" clauses of the XIV Amendment thereto.

2. The court erred in refusing to admit in evidence plaintiffs' offered Exhibit No. 2, the same being a letter from W. S. Farmer, O.D. to Oklahoma optometrists, dated March 13, 1953, a copy of which is attached hereto as Appendix "A".

Wherefore, plaintiffs pray that the final judgment and decree of the District Court may be reversed to the extent that it is inconsistent with the errors herein assigned by plaintiffs, and for such other and further relief as the Court may deem just and proper.

Dated May 25, 1954.

Duke Duvall, 1501 Liberty Bank Building, Oklahoma City 2, Oklahoma; John M. Phillips, Dick H. Woods, Nine West Tenth Street, Kansas City 5, Missouri, Attorneys for Plaintiffs.

[fol. 119] Exhibit A omitted. Printed side page 885—infra.

[fols. 120-129] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6002-Civil

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, dba Douglas Optical; and Oran Rips, Plaintiffs,

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma; et al., Defendants.

Before Murrah, Circuit Judge, and Vaught and Wallace, District Judges.

Wallace, District Judge. (Chief Judge Vaught concurring.)
OPINION—Filed March 1st, 1954

The plaintiffs bring this action under the Federal Declaratory Judgment Act[1] and challenge the constitutionality of certain provisions found in the recent Oklahoma Enactment dealing with the regulation of "visual care".[2] The statute subject to attack is commonly referred to as Enrolled House Bill No. 953 and is entitled:

> "An Act relating to visual care: Defining terms; prohibiting dishonest and dangerous practices in the sale of optical goods and devices; prohibiting discrimination; making the Act cumulative to other laws; making violation a misdemeanor authorizing injunction against violators."

[fol. 130] Plaintiffs, Carp, an individual, and Lee Optical Company, an Oklahoma corporation, are "dispensing opti-

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[1] 28 U.S.C.A. §§ 2201, 2202. In addition plaintiffs request an injunction against enforcement of this State statute; this necessitates the three judge court provided for in § 2281.

[2] 59 Okla. St. Ann. §§ 941-947 (1951).

cians";[3] the other plaintiff, Rips, is an ophthamologist, duly licensed to practice in Oklahoma, who offices in Tulsa, Oklahoma, in space rented from the Zales Jewelry Company.

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[3] The dispensing optician is both a craftsman and a merchant. He maintains a complete stock of frames from which the customers may make selections; these frames vary in size, shape, color and adornment. In order to fit the frames (and completed eyeglasses) to the customer's face he must have some artisan skill related to the science of optics and must have some knowledge of optical terms. As observed by A. D. Hill, a member of the National Guild of Prescription Opticians, and a Master in Ophthalinic Optics, a dispensing optician, in response to a question on just what his duties included: "A. I receive ophthalmic prescriptions from the ophthalmologists, and in very rare instances optometrists; do the technical work which involves measuring the distance between the pupils, commonly known as P.D., aiding in the selection of a frame, and of course in many cases it is a matter of styling with women, and some men are a little bit particular about what type of frame they wear; so actually it's a combination of technical work plus merchandising." (Tr. 77)

In addition to the dispensing optician the field of visual care has three other definable divisions. (1) The ophthamologist, a dulyy licensed medical doctor who specializes in the care of the eyes; (2) The optometrist, a quasi-professional who is trained to examine the eyes for refractive error, and at the same time recognize but not treat diseases of the eye, and who acts also as craftsman and merchant in filling prescriptions for eyeglasses; (3) The optician (or optical supplier) who is a skilled artisan qualified to actually grind lenses and perform other tasks which the dispensing optician may not be equipped to perform.

Plaintiffs Carp and Lee Optical direct their constitutional criticisms at parts of sections 2 and 3 of the instant Act;[4]

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[4] Section 2 states: "It shall be unlawful for any person, firm, corporation, company, or partnership * * * (not an Oklahoma licensed ophthalmologist or optometrist) to fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that * * * (an Oklahoma licensed ophthalmologist, a duly licensed medical doctor who specializes its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses."

Section 3 provides: "It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction. Provided, however, that the provisions of this Act shall not

[fol. 131] plaintiff, Dr. Rips, questions a portion of section 4.[5]

[fol. 132] It is recognized, without citation of authority, that all legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not

render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor of said commodity or material; nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sun-glasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser."

[5] Section 4 provides: "It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction to receive or accept any rebate, kick-back, reward or premium from any optical company or any other person, firm, or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any * * * (Oklahoma licensed ophthalmologist or optometrist). It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization, group or lay person and it shall be likewise unlawful for any corporation, lay body, organization group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of * * * (an Oklahoma licensed ophthalmologist or optometrist) provided that this sentence shall not apply to the University of Oklahoma School of Medicine and

by decision invalidate an enactment merely because in the court's opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. A court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory." (Hospitals, or to a bona fide resident physician of a licensed hospital. *No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store.* Nothing in this Section shall prohibit " " " (an Oklahoma licensed opthalmologist or optometrist) from organizing or maintaining a professional association with other persons so licensed." (Constitutional objection raised to portion emphasized.)

As phrased in the Court's syllabus in Adwon v. Oklahoma Retail Grocers Ass'n., Inc. (1951) 204 Okla. 199, 228 P. 2d 376, 377; "The Legislature is itself the judge of the conditions which warrant legislative enactments, and they are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary, capricious, and unreasonable, and hence irreconcilable with the conception of due process of law."

As observed by Mr. Justice Burton in the recent case of Salsburg v. State of Maryland (No. 38—October Term, 1953, p. 8, fn. 9): " '. . . It is . . . a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power.' Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 104. 'A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to

The Attorney General, in urging the validity of the [fol. 133] Act in question, emphasizes that the general purpose and intent of the Act, as evidenced by the title's broad scope, is to make certain that the people of Oklahoma receive the best possible visual care;[7] and, argues that to achieve such a goal it is imperative that the entire field of visual care (or responsibility therefor) be under the direct supervision and administration of professional practitioners (either physicians or optometrists) with all non-licensed artisans and commercial interests prohibited from activity except pursuant to professional written prescription authority.

Unquestionably, many aspects of the field of visual care are of sufficient public interest to warrant the operation of police power authority, and many regulatory measures directed toward protecting the public in regard to eye care have been judicially sanctioned.[8] However, the manner and extent to which the definable segments which compose the entire field of visual care can be controlled, like all other objects of legislative regulation, is limited by that line wherein to cross-over is to step into the area of arbitrari- [fol. 134] ness, unreasonableness and lack of rationality between the proposed control and the actual welfare of the public. Significantly, the "field of visual care", in its broadest aspect, occupies a rather unique position. The services rendered therein include those exclusively profes-

justify it.' Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 584. See also, Middleton v. Texas Power & Light Co., 249 U. S. 152, 157-158; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78-79."

[7] This distinguishes the instant case from Palmer v. Smith (1948) 229 N.C. 612, 51 S.E. 2d 8 and Kindy Opticians, Inc. v. Michigan State Board of Examiners (1939) 291 Mich. 152, 289 N.W. 112, inasmuch as the primary issue before those courts was whether certain artisan practices constituted a practice of optometry.

[8] See, for example, Roschen v. Ward, Attorney General of the State of New York (1929) 279 U. S. 337 ——, S. Ct. ——; Commonwealth v. Kresge Company (1929) —— Mass. ——; 166 N.E. 558; Ritholz v. Commonwealth (1954) —— Va. ——, 35 S.E. 2d 210.

sional, those quasi-professional, those artisan and those strictly mercantile in character; and, each of these services has evolved into separate and distinct class of private endeavor.[9]

Although, the artisan, the merchant, as well as the professional may be regulated in any field where the regulated efforts bear directly upon the public health and welfare,[10] none can be restricted where the particular acts regulated do not involve matters of public interest; and, where a general field of endeavor is specifically composed of definable activities, some of which pertain to public health and welfare and other of which do not, the non-

[9] The original of the ophthalmologist, the pure professional, is identical to that of other medical doctors, or physicians; however, he has specialized in eye care. The optometrist, the quasi-professional, evolved from an artisan-merchant beginning to the place where certain professional training and experience has qualified him to examine eyes for refraction and recognize although not treat diseases of the eye; in addition, he has retained the artisan-merchant characteristic and continues to fill prescriptions and market the completed spectacles. The optician (whether a dispensing optician or an optical supplier) continues as a skilled artisan and a merchant who sells both services and goods.

[10] The test is not whether the service is professional, artisan or merchant, but whether the services rendered and merchandise sold directly relate to the public health and welfare. However, historically, there has been considerable correlation between the education and experience required to qualify a person for specific tasks, and the importance such tasks carry with regard to the public good. Thus, the true or learned professions, almost without exception, have been subjected to statutory regulation for the public's protection; and, where certain crafts and businesses which have existed for a considerable length of time and operated entirely free from regulation are prohibited or severely restricted the public necessity for such legislative control must be definite and not merely fanciful.

[fol. 135] related activities cannot be regulated merely because of proximity of position. Control must cease when we pass from matters touching public welfare into matters historically mercantile and not rationally related to the public good; and, even where the public welfare is involved, the effect of the statute must bear a reasonable relation to the purpose to be accomplished[11] and must not discriminate between two similarly circumstanced groups, regulating one group but exempting the other.[12]

Clearly, that phase of visual care which deals with the actual examination of the eyes (whether for pathology or refraction)[13] together with promotional advertising which brings direct mercantile pressure upon the public to submit to examinations and to purchase spectacles, is subject to legislative control.[14] Although the evidence in the instant case indicates that no permanent injury to the eye can

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[11] Liggett Company v. Baldridge (1928) 278 U. S. 105, 111, 49 S. Ct. 57; Lawton v. Steele (1893) 153 U. S. 133, 137, 14 S. Ct. 499.

[12] Royster Guena Company v. Virginia (1920) 253 U. S. 412, —— S. Ct. ——; Coalgate v. Harvey (1935) 296 U. S. 404, 422, 423, —— S. Ct. ——; Old Dearborn Company v. Seagram Corporation (1936) 299 U. S. 183, 197, —— S. Ct. ——. Also, see People v. Weiner (1915) 271 Ill. 74, 110 N.E. 870.

[13] "* * * In furtherance of its general purpose and to carry out the details of its plan of regulation, the Legislature could properly vest the board (of examiners) with power to make regulations reasonably adapted to assure the competency of optometrists and to prevent conduct on their part which would tend to do harm to the public. (citing cases)". Sage-Allen Co. v. Wheeler (1935) —— Conn. ——, 179 Atl. 195, 200.

[14] State of Louisiana v. Ronas (1952) —— La. ——, 67 So. 2d 99; Ritholz v. Commonwealth (1945) —— Va. ——, 35 S.E. 2d 210; Commonwealth v. Ferris (1940) —— Mass. ——, 25 N.E. 2d 378.

result from eyeglasses which concededly are misfitted,"[15] [fol. 136] the importance of accurate sight and seeing comfort (that is, a freedom from nervousness and other minor irritations which can result from ill-fitted spectacles) brings this segment of visual care squarely within the sphere of police power authority. Unquestionably, the general health and welfare could suffer as a result of promiscuous and indiscriminate fittings of eyeglasses by persons unqualified to examine the eyes, particularly where the examiners were not qualified to recognize, even if not treat, various diseases of the eye; and, in a more limited sense the health and welfare would be adversely effected if en masse the people wore improperly refracted eye glasses which impaired the overall seeing ability and comfort of the spectacle wearing public.

Although much of the Act under consideration constitutes a legitimate exercise of the legislative police power, this Court, without impliedly sanctioning all other portions of this Act, is of the opinion that this legislation in impact is unconstitutional at the following three points:

I

Those portions of section 2, which make it unlawful for any person not a licensed optometrist or ophthalmologist,

> "To fit, adjust, adapt or to in any manner apply lenses frames, prisms, or any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the [fol. 137] frames, any lenses or other optical appliances

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[15] As mentioned by Dr. Tullos O. Coston, eminent ophthalmologist: "Q. In that connection, Doctor, if a person has a refractive error in his eye, and doesn't obtain glasses, is his eye going to be damaged or injured in any way? A. There will be no change in the anatomical structure of the eye, there will be no damage whatever whether he wears proper glasses or does not." (Tr. 38, 39)

"I think you would have a very difficult time in demonstrating that any person is definitely damaged by being supplied with glasses that are not perfect correction of his refractive error." (Dr. Benedict, dep. p. 41.)

which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.

The unambiguous language of section 2 makes it unlawful, among other things, for either a dispensing or laboratory optician to take old lenses and place them in new frames and then fit the completed spectacles to the *face* of the eyeglasses wearer except upon written prescription from a qualified eye examiner. Obviously, this serves to prohibit the wearers of eyeglasses from exchanging their frames either to obtain more modern designs or because the former frames are broken, without first visiting an ophthalmologist or optometrist; and, which in turn diverts from the optician a very substantial, as well as profitable, part of his business.[16]

The evidence indicates, almost without variance, that written prescriptions issued by the professional examiner contain no directive data in regard to the manner in which the spectacles are to be fitted to the face of the wearer. In addition, the Court is satisfied that the mere fitting of frames to the face, where the old lenses are available, is in reality only an incident to what fundamentally is a merchandising transaction, that is, the sale of a pair of frames; and, in any event, the knowledge necessary to perform these services is strictly artisan in character [fol. 138] and can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist.

Although, as emphasized previously, the legislature can regulate the artisan, the merchant, or the professional

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[16] As demonstrated by the evidence the dispensing optician has two things to sell, lenses and frames. If prospective purchasers of frames are required to go to an ophthalmologist or optometrist to get an ophthalmic prescription, inasmuch as the optometrist fills all of his own prescriptions (and actually sells between 60-70% of the eyeglasses sold) the inevitable effect will be to deprive the optician of a sizeable amount of trade.

where the regulated services embrace issues of public health and welfare, the services under consideration bear no real or rational relation to the actual vision of the public. *Prospective* wearers of eyeglasses are not affected inasmuch as a person seeking this particular service must already possess a pair of eyeglasses; and, *present* wearers of eyeglasses are not imperiled inasmuch as such wearers have previously submitted to examinations by professional men at the time the original pairs of spectacles were obtained.

It is most important to note that the flexibility of the human eye, with particular emphasis on the service now being discussed, is such as to assure the eyeglass wearing public of good vision even where succeeding frames when fitted to the face are not always fitted in the same manner. Dr. Tullos O. Coston, in testifying in regard to the actual refraction of the eye, accented the liberality which prevails in connection with visual correction:[17]

> "* "* * * What we aim to do in a refraction, I think that sometimes we get mixed up in technical things too much. The aim of proper refraction is first of all to have the best vision that the glasses will give the patient, plus comfort. Now if the glasses are fitted improperly, and a number of times that will be true, because the patient subjectively didn't give you the proper answers, or maybe the doctor was a little careless that morning, but if he gets the glasses and he sees well, and has no discomfort, suppose that a mistake had been made somewhere, it is of no importance. You fit the patient with glasses to make [fol. 139] him see the best you can, with comfort. *Now technically whether you've got it on this axis or that axis is of absolutely no importance,* and you find people wearing the screwiest type of glasses, that when you get through examining them, your reading and your interpretation of what they need is exactly different to what they have worn, but they have been quite comfortable and they have seen well with what they have had.
>
> "Now you have two choices. You can let them wear

[17] (Tr. 71-72).

> what they have, or you can give them a new pair of glasses, and very often we let them wear what they have had, if financial matters enter into it. *You can't say that the eye is like a piston in a cylinder, you don't have to fit it to that tolerance.*" (Emphasis supplied)

If such be true in regard to the actual examination of the eyes for refraction, even more so such must be true in regard to the mere placing of original lenses in new frames and placing the frames to the face of the wearer. The legislature cannot control these specific functions, and in effect deprive opticians of their right to freely pursue a lawful calling, under the guise that such control is reasonably and rationally related to the health and welfare of the people.

The effect of section 2 which prohibits the duplication of existing lenses (that is, the preparation of a completely new set of spectacles) without a *written* prescription is also unconstitutional.

The evidence establishes beyond controversy that a skilled artisan (such as an optician) can accurately ascertain the power of a lense, or fragment thereof, without the aid of a written prescription, and can thus duplicate or reproduce the original pair of spectacles without adversely affecting the visual ability of the eyeglass wearing public. This process requires no unusual professional judgment, peculiar to the licensed professions of ophthalmology and optometry but is strictly artisan in character. The power [fol. 140] of the originally prescribed lense, or fragment thereof, can be learned by the use of a mechanical device known as the lensometer; this device (whether being operated by a professional or layman) scientifically measures the power of the existing lense and reduces it to prescriptive terms.[18]

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[18] Significantly, the court in Palmer v. Smith (1948) 229 N.C. 612, 51 S.E. 2d 8, 11, concluded from the evidence there adduced: "It is undisputed on the record that a qualified optician can take a whole or broken lense and by use of a vertometer or lensometer, duplicate such lense with accuracy and exactness. The process of duplication is conceded to be a purely mechanical one."

Obviously, the accuracy of the lensometer operation is only commensurate to the care and skill exercised by the operator; and, logically, the vision of eyeglass wearers could be impaired somewhat by a careless commercial usage of this machine resulting in the mass production of lenses which were not accurate duplications of the original prescriptions.

Although on this precise issue of duplication, the legislature in the instant regulation was dealing with a matter of public interest, the particular means chosen are neither reasonably necessary nor reasonably related to the end sought to be achieved. As observed in the classic case of *Lawton v. Steele*:[19]

> "* * * To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that *the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.* (emphasis supplied)

It is absolutely unnecessary to delegate to professional men the control of and responsibility for the just-mentioned [fol. 141] artisan tasks, where the opticians, as a group possess adequate skill to fully protect the vision of the public in accurately duplicating existing lenses. The operation of the lensometer does not rise to the need or dignity of exclusive professional supervision. A qualified witness demonstrated and testified that any reasonably intelligent person can be taught to operate the lensometer and become qualified to accurately learn the power of existing lenses, or fragments thereof, within several hours. As further demonstrated by the evidence, the opticians, as a class, have for a number of years used the lensometer in their trade and the optometrists and ophthalmologist use this same device when wishing to check the power of lenses; and, although only a minority of licensed ophthalmologists require a patient to return to the examiner's

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[19] Fn. 11, supra.

office to check the accuracy with which the original prescription has been filled, even in such instances the lensometer is not operated by the physician but by a clerk in the office.

The legislature has been guilty of undue oppression in failing to set up qualifying standards for the opticians, if such standards be necessary for the public protection, and at the same time arbitrarily legislating many of the skilled artisans out of a long recognized trade, by delegating the sole control of their skills and business to a professional group,[20] when the public can be completely protected with-[fol. 142] out taking from the optician this valuable property right.[21]

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[20] The effect of section 2 is to place within the exclusive control of optometrists and ophthalmologists the power to choose just what individual opticians will be permitted to pursue their calling inasmuch as where the professional men must first give a written prescription and then "remain responsible for the full effect of the appliances so furnished by such other person" the ophthalmologists will pointedly refer their business to a limited number of channels, thus denying all other opticians the opportunity to follow their trade regardless how competently the remaining opticians are qualified. As shown by Dr. Coston's testimony: "Q. Doctor, I will ask you if under the law of Oklahoma, you are held liable for the glasses dispensed pursuant to a prescription of yours, will you issue prescriptions and permit them to be taken to any optician that patient might choose? A. No. Q. What will you do if that is the situation, assuming what I have said is the law? A. Patient will be directed to an optician I know to be reputable and reliable." (Tr. 51) Obviously, the optometrists will refer little if any business to the opticians inasmuch as they are competitors.

[21] If the function of the optician is such as to require licensing, the legislature can proceed to establish standards which must be met before an optician can be registered and forbid the practice of opticianary by non-registered opticians, just as has been provided in regard to pharmacists.

Also, on this specific point under consideration, the legislature did not act in accordance with the requirement pronounced by Mr. Justice Sutherland in *Liggett Company* [fol. 143] *v. Baldridge:*[22]

> "The act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary

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(See 59 Okla. St. An. 331, et seq.) The action by the legislature in the instant act is as unreasonable as if pharmacists were divested of their right to do business by legislative action which delegated to physicians the absolute control and responsibility for accurate *compounding* of medical prescriptions for the reason that a physician alone is qualified to *prescribe* drugs for patients.

Obviously, the opticians do not possess qualifications which would enable them to become licensed ophthalmologists or optometrists. As observed in Smith v. Texas (1914) 233 U.S. 630, 638: "* * * in the exercise of the police power the State may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited, but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employe. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special and favored position. *Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.*" (emphasis supplied) Cf. People v. Brown (1950) 407 Ill. 565, 95 N. E. 2d 688.

[22] Fn. 11, supra.

> invasion of appellant's property rights guaranteed by the Constitution."

The means chosen by the legislature does not bear "a real and substantial relation" to the end sought, that is, better vision, inasmuch as although admittedly the professional eye examiners are specially trained in regard to eye examination, they possess no knowledge or skill superior a qualified practicing optician insofar as the artisan tasks in view are concerned, and in fact the two professional groups, as a class, are not as well qualified as opticians as a class to either supervise or perform the services here regulated.

In addition, and of even more significance, is the fact that section 3 exempts from regulation all sellers of ready-to-wear glasses,[23] even though such sellers, from the viewpoint of public health and welfare, lie within the identical class and circumstance occupied by "fitters and sellers of frames" and "duplicators of lenses and entire spectacles."

The rule is clear that where the police power is ushered into play it must be exercised in an undiscriminating manner in relation to all persons falling within the same class or circumstance. This principle was enunciated in *Royster Guano Company v. Virginia* wherein the Court said:[24]

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classi- [fol. 144] fication for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. *But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.* * * *" (emphasis supplied)

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[23] See Fn. 4, supra.

[24] Fn. 12, supra, at 415.

In the instant legislation not only is the "relation to the object of the legislation" questionable (as previously discussed) but "all persons similarly circumstanced" pointedly have not been treated alike. Persons who sell frames (incidentally adapting and fitting the completed spectacles to the face), persons who duplicate original eyeglasses and market the duplicated spectacles, and persons who sell ready-to-wear glasses are identically situated; that is, all are sellers of merchandise which is not immediately connected with or supervised by a professional eye examiner. Yet the public health and welfare is touched in the same manner and degree by each of these groups inasmuch as the possible result is exactly the same; people may wear spectacles which are not best suited for their eyes.

The legislature must not blow both hot and cold! If it be desirable for the public protection that opticians sell merchandise and service only upon written prescriptive authority, the legislature cannot at the same time permit the unsupervised sale of ready-to-wear (convex spherical lenses) eyeglasses. The mere fact the public selects at will from the counter serves as no basis for distinction; if such constitutes a distinction then the public should have the equal right to purchase new frames or duplicate prescription eyeglasses at will.

In reality, the unrestricted sale of ready-to-wear eyeglasses doubtless is more perilous than the practices pro- [fol. 145] hibited by section 2. It is certain that the customer purchasing new frames, or duplicate lenses and frames, has at some time been to a qualified eye examiner, one qualified not only to refract the eyes but qualified also to recognize diseases of the eye; whereas, the purchaser of ready-to-wear eyeglasses has not even been provided with the safeguard of an initial examination.

An example of unlawful discrimination between business groups similarly situated but wherein the legislature artificially attempted to place the businesses in two different classes is found in the case of *People v. Weiner*, wherein the court in dealing with a statute which forbade the use of secondhand material in the making of mat-resses (for sanitary reasons) but placed no such restriction in regard

to the making of pillows, held that the attempted classification was arbitrary and unreasonable and in doing so said:[25]

> "Counsel * * * argue that there is a discrimination between the manufacturers and dealers in pillows and manufacturers and dealers in mattresses, comforters, and quilts, especially after they have been used, as there is no provision made as to pillows; that, so far as this act is concerned, material made secondhand in the same way as the material in the mattresses may again be made into pillows and sold without any regulation whatever. Under the decisions of this state this is class legislation. (citing authorities) The provisions of sections 1 and 2 of the act are arbitrary and unreasonable, and must be held unconstitutional and void."

Inasmuch as there is no real difference between ready-to-wear spectacles and prescription eyeglasses, insofar as the public's need for properly fitted eyeglasses is concerned, to regulate prescription eyeglasses, as done in sec- [fol. 146] tion 2, and yet expressly exempt ready-to-wear eyeglasses constitutes an unreasonable and discriminatory classification in contravention to the equal protection clause of the Fourteenth Amendment.

II

That portion of section 3 which makes it unlawful "to solicit the sale of * * * frames, mountings * * * or any other optical appliances."

As mentioned previously, the legislature has the authority to regulate and control "bait advertising", that is, advertising which not only tends to persuade the public to submit to eye examinations but also tends to result in the purchase of completed pairs of spectacles.[26] Clearly, it is

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[25] Fn. 12, supra, at 873, 874.

[26] Fn. 14, supra. In approving that line of authority which holds that the legislature has power to regulate ad-

[fol. 147] against the best interest of the public to have the number of eyeglasses worn determined by mercantile practices rather than the actual visual need of the people. Where advertising, which when uncontrolled, encourages such a condition the right of the legislature to supervise

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vertising by retail dealers of eyeglasses, the Court in the very recent case of State of Louisiana v. Rones, fn. 14, supra, at 105, commented: "* * * These courts have decided that the statutes are a reasonable exercise of the *policy* power because they prevent 'bait advertising' which attracts the unwary to purchase inferior glasses; eliminate the temptation to, and the pressure upon, customers that result from the assurance that no more than a named price will be charged; protect an uncautious and unwary public from being misled and deceived; prevent the increase in sales and the incidental harm that come from unfitted eyeglasses; eliminate to some extent poor quality and poor workmanship which naturally result from the desire to sell spectacles in quantity at a low advertised price for the purpose of underselling competitors."

Advertising which tends to mislead the public into thinking the advertiser is qualified to practice professionally is likewise subject to regulation. See Curtis v. Registered Dentists of Oklahoma (1943) 193 Okla. 233, 143 P. 2d 427 wherein at 429, the Court said: "* * * we are of the opinion that it is apparent that it was the intention of the Legislature to protect the public from any person who might undertake to engage in the practice of dentistry without license to do so, and that part of its purpose was to prevent anyone other than licensed dentists supplying artificial substitutes for natural teeth to the persons who would use them. An examination of the stipulation of facts discloses that defendant, who had no license to practice dentistry, was engaged in the business of supplying substitutes for natural teeth to the public at large through advertisements in the newspapers and the telephone directory which patently were designed to induce the public to believe that the defendant was authorized to engage in the practice of dentistry by supplying artificial substitutes for natural teeth."

this segment of the field of visual care is identical with the legislature's right to supervise the fields of medicine and dentistry.[27]

Thus, any statute which regulates advertising in regard to eye examinations (that is, for eye diseases and for refraction, by one qualified to recognize, if not treat, diseases of the eye) or other advertising which promotes the sale of complete eyeglasses (particularly the original pair)[28] upon mere merchandising principles rather than in regard to [fol. 148] the actual visual need, can be deemed rationally related to the public health and welfare. However, where

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[27] As mentioned in Semler v. Oregon State Board of Dental Examiners (1935) 294 U.S. 608, 612, 55 S. Ct. 570: "The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them'. The Legislature was aiming at '* * *' bait advertising. 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed dental work" was, as a general rule, the practice of the charlatan and the quack to entice the public. * * *'"

[28] This parenthetical observation is made because the Court believes that the primary basis of the legislative authority is the fact that the public should not be induced to become eyeglass wearers under the same conditions they are induced to purchase ordinary mercantile commodities. Once a person has been properly examined and has become a spectacle wearer, advertising in regard to even a completed set of eyeglasses presents very little evil as to him although it may still be of public interest to control advertising, with accompanying competitive practices, which may result in the production of inferior optical merchandise and service.

a statute, such as the provision under consideration, intrudes into a mercantile field only casually related to the visual care of the public and restricts an activity which in no way can detrimentally effect the people, such an intrusion is unconstitutional."

"The effect of the instant statute, which even prohibits the display of frames in a show window, must be sharply distinguished from Commonwealth v. Kresge Co. (1929) —— Mas. ——, 166 N.E. 558, 560, 561, wherein the court said: "It seems to us that the statute here in question conforms to every requirement for validity thus laid down and is not obnoxious to any one of them. The defendant is undertaking to invade under the guise of private mercantile business a field rightly sequestered, by the Legislature in the interests of the public health (that is, the fitting to the eyes and sale of completed ready-to-wear spectacles) to those possessing special skill and training in a specified department of treatment of human ills."

In addition, although the field of visual care has been the object of *regulation* in regard to advertising (see fn. 14, supra) this Court knows of no instance where a legislature has utterly *prohibited* all forms of advertising, except the Louisiana Legislature. (See L.S.A.-R.S. 37:1041 et seq.) Significantly, the Louisiana Supreme Court in the Sones case, fn. 14, supra, at 106, although ruling that § 1063(9) of the Louisiana Act which prohibited any retailer from advertising optometric services or spectacles "as free or for a price," was constitutional, the Court by way of dictum remarked that as to § 1065 (the section completely prohibiting advertising of any form) "a plea of unconstitutionality might have merit." Distinguish the instant legislation from the issue in City of Springfield v. Burst (1944) —— Ohio ——, 56 N.E. 2d 185, 186 wherein a city ordinance was held constitutional which forbade "advertisement by newspaper, radio, display, or otherwise, *any statement advertising the price of lenses, or of complete eyeglasses*, including lenses, either with or without professional services or credit terms, installment payments or price plans, or the price of any frames or mountings,

[fol. 149] Naturally, where a commodity being sold is so closely associated with the administration of medical treatment to a patient that the commodity itself becomes a mere incident to and actually a part of the medical treatment being rendered, becoming part and parcel of the professional judgment being exercised on behalf of the patient, then the commodity is subject to complete control and regulation; as observed by Mr. Chief Justice Hughes in *Semler v. Oregon State Board of Dental Examiners*[20] such a condition exists in dentistry:

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the market place."

However, this Court discerns utterly no analogy between the danger inherent in uncontrolled dental advertising, and advertising by dispensing opticians, or others, of various styles of frames, mountings and other modern and improved optical appliances, where such advertising omits the promotion and display of lenses or complete eyeglasses and makes no reference to eye examinations. Publicity limited strictly to frames can be deemed nothing more than straight merchandising inasmuch as it has no real relation to the vision of the public and should only be subject to those limitations recognized generally in regard to ethical mercantile advertising.

Inasmuch as a large majority of the eyeglass wearing public have more than one set of eyeglasses they are, from

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unless in conjunction therewith the words, 'without lenses' appear in such manner to be clearly discernible, or read in such manner as to be clearly understood." (emphasis supplied); and, likewise distinguish Klein v. Department of Registration and Education (1952) —— Ill. ——, 105 N.E. 2d 758 which had to do with the restricting of certain kinds of advertising by optometrists.

[20] Fn. 27, supra, at 612.

[fol. 150] time to time in the market for new frames, not only to replace broken ones but to acquire those more modern in appearance as the frame has become an integral part of the present-day cosmetology. Advertising directed exclusively at this feature of eye wear can have no deleterious effect on the public, inasmuch as it has no influence on the *prospective* wearer of eyeglasses, and to the *present* wearer (a person already examined by a licensed professional) is but a mere piece of merchandise.

The dispensing optician, a merchant in this particular, cannot arbitrarily be divested of a substantial portion of his business upon the pretext that such a deprivation is rationally related to the public health.

III

That portion of section 4 which provides that: "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store".

Unquestionably the legislature has the authority to prohibit corporations from practicing Ophthalmology and Optometry in Oklahoma; and, insofar as section 4 moves inferentially toward such a goal, the legislature has acted within its authority.[31] As stated in *Sears Roebuck & Company, et al. v. State Board of Optometry*,[32]

> "In the clear and comprehensive opinion the chancellor examined the statutes, and said in part as [fol. 151] follows: 'The weight' of modern authority is against such arrangements as we have here (i.e. corporate practice in the field of optometry), and the question presented is whether the optometrist is working for the defendant companies as an employee, or for himself as a licensed and independent practitioner.
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> "'*It is only in the latter capacity that his status could be legal and his license authoritative in profes-*

[31] See fn. 5, Supra.

[32] ——— Miss. ———, 57 So. 2d 726, 730 (1952)

sional relation and service to the public.' " (Emphasis supplied)

And as recognized in *Neill et al. v. Gimbel Bros., Inc.*:[33]

"* * * We cannot pronounce arbitrary or irrational the placing of optometry on a professional basis. This conclusion finds support in other jurisdictions. (citing cases)

* * *

"* * * The legislature has the right to forbid such practice as contrary to public policy, which is properly concerned with the maintenance of high professional standards. *One who practices a profession is apt to have less regard for professional ethics and to be less amenable to regulations for their enforcement when he has no contractual obligations to the client, does not fix or receive the fees, and is under the control of an employer whose commercial interest is in the volume of sales of merchandise effected by the prescriptions of the employee-practitioner.*" (Emphasis supplied)

However, to forbid the renting or sub-leasing of quarters from retail merchants in order to enforce the legislative prohibition against corporate practice constitutes an arbitrary interference with the right of contract.

Concededly, as some of the cases illustrate, corporate practice has taken place where corporations sub-lease space to professional eye examiners. However, the correlation between the evil sought to be prevented and the one circumstance singled out and prohibited is not sufficient to authorize such a police power regulation. As mentioned [fol. 152] in *Treigle v. Acme Homestead Association*:[34]

"* * * Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the

[33] 330 Pa. 213, 199 Atl. 178, 182 (1938).

[34] 297 U.S. 189, 197 —— S. Ct. —— (1936).

> power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

And as observed in *Indiana ex rel. Anderson v. Brand*:[55]

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end * * *"

We believe the means chosen in this particular instance is "arbitrary and oppressive" and not reasonably adapted to the accomplishment of the end sought, that is, the abolition of corporate practice in the professions of ophthalmology and optometry. As evidenced in the *Sears Roebuck & Company case*, supra, even though a leasing arrangement can be used to attempt to evade a corporate practice prohibition, nonetheless, the fact of statutory violation can be established by competent proof of the kind and character used to prove any other statutory breach.

Whether a professional man indulges in corporate practice, in violation of a statutory prohibition, is a matter of his individual integrity rather than his geographic location.

The instant prohibition is just as unreasonable as if the legislature, in order to aid in the enforcement of certain [fol. 153] criminal statutes, banned the use of automobiles by the general public because law violators use automobiles in their illicit operations.

Conclusion

It is the opinion of this Court that the plaintiffs are entitled to a permanent injunction restraining and enjoining the defendants Mac Q. Williamson, Granville Scanland, Robert L. Wheeler, and all remaining County Attorneys

[55] 303 U.S. 95, 108, —— S. Ct. —— (1938).

in the State of Oklahoma from enforcing or attempting to enforce against the plaintiffs[46] the provisions of sections 2, 3 and 4 which have been designated as unconstitutional in this written opinion.[47]

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[46] The Court recognizes that the legislature has the authority to prevent "bait-advertising" and other evils associated therewith in the nature of corporate practice; and, that the instant plaintiffs at this time may be engaged in practices which rightly can be prohibited by the legislature in a valid enactment; however, the legislature cannot, as here attempted, kill the patient in order to eliminate the disease.

[47] The Attorney General has not urged that the plaintiffs are not entitled to equitable relief even though certain provisions of the instant Act have an unconstitutional impact upon the plaintiffs. However, this Court is not unmindful of the cardinal principle that Federal courts of equity should not interfere with the processes of the criminal law in State courts or determine questions of criminal liability under these laws, unless in most exceptional circumstances in order to prevent irreparable loss. Beal v. Missouri Pac. R. Co. (1940) 312 U.S. 45, 50; and "* * * the imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified." Watson, et al. v. Buck, et al. (1941) 313 U.S. 387, 400. Cf. Spielman Motor Co. v. Dodge (1935) 295 U.S. 89, 95.

[fol. 154] The plaintiffs' allegations, together with the undisputed proof, indicate that immediate and unrelenting enforcement of all the provisions of this Act, provisions clear in meaning and intent, by the defendant State officers, is imminent; in fact, defendants' counterclaim in this suit specifically demands injunctive relief against the plaintiffs as authorized by section 6 of the instant Act. The inevitable result of the enforcement of the provisions found by this Court unconstitutional in points I and II of the Opinion, as applied to the two dispensing optician plaintiffs, will be

Counsel should submit a journal entry to conform with this opinion within 15 days.

[fol. 155] Murrah, Circuit Judge, dissenting in part:

With reluctance and some misgivings, I concur in that part of the judgment of the court declaring unconstitutional the legislative prohibitions against fitting, adjusting, adapting or applying lenses, frames, prisms or other optical appliances to the face of a person, or duplicating or re-

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to literally put said plaintiffs out of business; unquestionably, from such an injury there can be no adequate remedy at law and that such will result is not conjectural but positive. The effect of the enforcement of the Act on the unconstitutional feature discussed in point III of the opinion, as applied to plaintiff, Dr. Rips, although not resulting in putting Dr. Rips clear out of business, will be to compel said plaintiff to relinquish a very desirable and valuable lease and to move to another place of business. Insofar as all plaintiffs are concerned no adequate remedy is available; the State cannot be held responsible for the business loss of the two dispensing optician plaintiffs or the loss of a lease by plaintiff Rips, valued at more than $5000; and, certainly a lessor cannot be held responsible for cancelling a lease in conformity with a state criminal law requirement (notice of cancellation of which has already been given).

It is contrary to the spirit of reason as well as equity to direct these plaintiffs to choose between complying with all provisions of the instant Act, thus submitting to irreparable and irrecoverable business losses while the constitutionality of the provisions of the statute are tested; or, to continue in business thus violating the clear language of the criminal law countless numbers of times each day in the hope that eventually such prosecutions will prove unsuccessful because of the unconstitutional nature of the criminal statute. Significantly, section 6 of the instant Act provides: "Any person, firm * * * violating any of the provisions of this Act shall be guilty of a misdemeanor and

placing the same without prescriptive authority of a licensed ophthalmologist or optometrist.

The obvious result of this legislation is to appropriate a property right of one class to follow a legitimate calling or occupation and to give it to another class not shown to be more competent in the public interest. Indeed, the evidence shows that it would be inimical to the public interest to require the wearer of eye glasses to return to the ophthalmologist in order to obtain a prescription for the replacement or duplication of an eye glass, or to place the burden upon the ophthalmologist of merchandising frames and mountings and other appliances, or placing that purely

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upon conviction thereof shall be punished for each such offense, as provided by law * * *"; and, 21 Okla. Stat. Anno. § 10 states that "* * * every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding one year or by a fine not exceeding five hundred dollars, or both such fine and imprisonment. * * *" What facts could more pointedly justify the exercise of equitable authority than these,—where the plaintiffs are faced with both an injunctive prohibition and a liability for multiple criminal prosecutions. See Toomer v. Witsell (1947) 334 U.S. 385, 391. Also, see Parker v. Brown (1942) 317 U.S. 341, 349; Family Sec. Life Ins. Co. v. Daniel (D.C.S.C. 1948) 79 F. Supp. 62, reversed on other grounds 336 U.S. 220. As observed by the three judge court in Russo v. Reed (D.C. Mo. 1950) 93 F. Supp. 554, 558, in a case directly in point: "Equitable jurisdiction in the premises on the ground of a threatened irreparable injury is clear and imminent is obvious, for the loss of a season's fishing can not be restored, and the State of Maine provides no means for recovering damages in money to compensate for the loss occasioned by an illegal deprivation of the right to fish commercially within its coastal waters. (citing case) Nor do we see any occasion here for application of the doctrine of American Federation of Labor v. Watson, 327 U. S. 583 * * * for the Maine statutory provisions involved are clear and need no interpretation, and so far as we are aware no other special circumstance exists requiring the federal courts to stay action pending proceedings in the courts of the State."

commercial monopoly in the optometrist. There is no rational basis for depriving the optician of the right to [fol. 156] perform this purely mechanical and commercial service to the public.

I cannot agree, however, that the legislature of the state may not constitutionally prohibit any person, firm, company, corporation or partnership from soliciting the sale of frames, mountings, prisms, or any other instrument deemed essential and used in the field of visual care by enumerated methods of advertising when it does so for the declared purpose of vouchsafing the "best possible visual care" to the public.

The effect of the order of the court is to make it unlawful to advertise the sale of spectacles, eye glasses or lenses but to allow any person, firm, company, corporation or partnership to solicit the sale of the empty frames, mountings, prisms and other appliances or devices. By this method one so engaged may circumvent the very evil to which the legislation is aimed, namely, prohibiting dishonest and dangerous practices in the sale of optical goods and devices.

There can be no doubt of the power of the legislature to regulate advertising practices of retail dealers of eye glasses. See State v. Rones, 67 So. 2d 99, and cases cited at Page 105. There may be good reasons for requiring [fol. 157] the prohibition of advertising the sale of merchandise, the actual sale of which is not prohibited. Commonwealth v. Ferris, 25 N. E. 2d 378. It is true that all of the statutes which have been upheld as a valid regulation or restriction on the advertising of the sale of eye glasses have been judicially construed to apply to the furnishings of optometrical services or actual visual care, and not the mere sale of frames, mountings or fittings as merchandise. But I entertain no doubt of the power of the legislature to regulate the advertising of the empty frames, mountings and prisms and other optical devices if the object of such legislation is the prevention of fraud or mistake or to protect the public against deceptive practices in the broad field of visual care. The power of the state to regulate or restrict advertising of a commercial business affected with a public interest has been upheld in a great variety of cases, including the sale of eye glasses. See Commonwealth v.

Ferris, supra, at page 380; Commonwealth v. Nutting, 55 N.E. 895, affirmed 183 U.S. 553; Ritholz v. Commonwealth, 35 S.E. 2d 219.

Considered in isolation, an eye glass frame or mounting is no more than a mere piece of merchandise. But considered in the context of the total field of visual care, [fol. 158] it takes on a significant relationship to the visual needs of the public and ceases to be a mere piece of merchandise to be dealt with in the market place on an arms length basis. As the dispenser of the completed eye glass the optician is a trained technician—the "right arm" of the ophthalmologist. As such he may be held to a standard more strict than the morals of the market place. Certainly the well-defined and legitimate functions he performs, both as a trained technician and a merchandiser, in the field of visual care are affected with a public interest, and the public may not be left to deal with him at arms length. And it is the same with the merchant optometrist. Certainly in the eyes of the public the optometrist is not seen in his dual capacity of a merchandiser as to whom he is required to deal at arms length and a professional in whom he can place his trust and confidence.

The challenged act is a legislative scheme to effect one declared public policy and each of its parts ought to be considered in *pari materia* in determining whether or not the legislature has acted beyond the scope of its broad and comprehensive police powers. Section 4 is pertinent, therefore, to the inquiry whether a valid constitutional basis can be found for prohibiting the advertisement of the merchandise not of itself related to visual care. Section 4 pro- [fol. 159] hibits rebates, kick-backs, and solicitation by those selling optical goods, appliances or materials. And it forbids corporate practice. All of these we leave as proper subjects of police power. But the judgment of the court strikes down that part of the section which prohibits any retail establishment from renting space in its establishment to any person doing eye examinations or visual care. This prohibition in the statute is said not to bear any reasonable relationship to the admitted power of pre-

venting corporate practice, or for that matter any other practice deemed not in the public interest.

I agree that on its face it seems unreasonable and irrational to deny to the professional man quarters in a retail establishment. But to me the undisputed facts in this case point up the very evil to which the legislation is aimed.

Ellis Carp is the owner or is interested in eighteen optical establishments in Texas. All of them are dispensing opticians. He is also interested in a supply house in Dallas where lenses are ground on orders from the dispensing opticians. In Texas, Mr. Carp employs persons on salary to refract the eyes of those who are induced to come to his optical establishments. By this method the dispensing optician solicits the business, refers the customers to the [fol. 160] salaried employee who does the refracting and prescribes for the visual correction. The prescription is returned to the optician for filing, fitting and adjusting. So, the optical company operating under a trade name actually performs the optical services constituting the very corporate practice which Oklahoma legislation condemns and prohibits.

In Oklahoma, Mr. Carp owns and operates the Douglas Optical Company in Tulsa in space rented from the Zale Jewelry Company. The Douglas Optical Company is a dispensing optical company which advertises by all of the media condemned in the challenged legislation. Soon after the Douglas Optical Company commenced business, Dr. Rips, a licensed ophthalmologist, and formerly in the employ of Carp in Dallas, came to Tulsa; conveniently rented space in the Zale Jewelry Company and set himself up in practice. Admittedly all of the members of the public seeking visual care, who are induced to come to Douglas by its advertisements, are referred to Dr. Rips, and while no one is compelled to take Dr. Rip's prescription to Douglas, "most of them go there because they generally come from there."

Mr. Carp is also the president of a corporation known as the Lee Optical Company with ground floor offices in the [fol. 161] American National Building in Oklahoma City. It employs advertising media condemned and prohibited in the legislation. Soon after the Lee Optical Company

opened for business in Oklahoma City, Dr. Conti formerly employed by Carp in Texas to refract eyes, came to Oklahoma City and established himself in offices on the third floor of the American National Building. All of the members of the public who are induced to come to the Lee Optical Company for visual care are referred to Dr. Conti whose prescriptions usually find their way back to Lee Optical Company for filling.

While neither Conti nor Rips is employed by Lee Optical Company or Douglas Optical Company, and neither of them rebates for the referrals, the reciprocal arrangements enable them to completely commercialize the whole field of visual care, which we agree is affected with a public interest and subject to legislative control.

Under the order of the court, Douglas may continue to occupy space in Zale's Jewelry Company in Tulsa. Dr. Rips may continue to occupy space under the same roof. The Douglas Optical Company may continue to advertise frames and mountings and other optical devices by radio, television, classified ads, and by any other commercial [fol. 162] means. It will continue to attract the unsuspecting public, who not knowing the difference between an optician, ophthalmologist, or optometrist, will undoubtedly find their way to Dr. Rips, who having prescribed will see that they are returned to Douglas in order to complete the cycle.

The loophole which this judgment leaves in the legislative scheme is wide and in my judgment glaring. It is an unwarranted interference with the police power of the state over a subject with which the state is fully competent to deal. To borrow the language of Mr. Justice Holmes: "We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is

limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power." Noble State Bank v. Haskell, 219 U.S. 104, 110.

[Vol. 163] In cases of this kind we ought to keep in mind the extremely limited restrictions that the due process clause of the Fourteenth Amendment places upon the states; and that federal courts should negatively inject themselves into the policy making powers of the states only in the presence of a palpable abuse of the due process clause of the constitution.

Sections 3 and 4 have uniform application and incidence to all affected thereby. There is no question of equal protection of laws involved. Only the question of due process under the Fourteenth Amendment is involved, and the basis of our jurisdiction is injunctive relief against the enforcement of a state statute with criminal sanctions. Before we rush in to strike down a part of the act, we ought to consider that due process in the state court is afforded to any person who would challenge any provision of the act by exposing himself to the criminal penalties involved. There is no more firmly established or salutary rule than the admonition against striking down the criminal laws of a state by federal injunctive process. Federal injunctive interference with the criminal laws of a state is justified only in exceptional circumstances and with a showing of great and immediate irreparable damage. Otherwise the [fols. 164-168] accused should first set up a defense in the state court where his constitutional rights may be amply protected. See Watson v. Buck, 313 U. S. 387, 400. Reed v. Lehman, 91 F. 2d 919; Starnes v. City of Milledgeville, 56 F.Supp. 956.

I would certainly stay the federal hand in respect to the enforcement of Sections 3 and 4 of the Act. As to Section 2, while I have some misgivings about injunctive relief, I am clear on the issue of constitutionality.

[fols. 169-178] Statement Required by Paragraph 2 of Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing)

[fol. 179] In the United States District Court

[Title omitted]

Order Allowing the Appeal—filed May 25, 1954

Plaintiffs Lee Optical Company, Inc., a corporation, and Ellis Carp, d/b/a Douglas Optical, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court entered in this cause on March 29th, 1954, and having also made and filed their Assignment of Errors and Prayer for Reversal, and Statement of Jurisdiction of the Supreme Court of the United States, and having in all respects conformed to the statutes and rules in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $500 with good and sufficient surety, said bond to be conditioned as may be required by law.

It is further ordered that citation be issued in accordance [fol. 180] with law.

Dated May 25th, 1954.

Edgar S. Vaught, District Judge; ——— ———, Circuit Judge; W. R. Wallace, District Judge.

[fol. 181] [File endorsement omitted.]

[fols. 182-184] Bond on Appeal for $500.00 approved and filed May 25, 1954 omitted in printing.

[fols. 185-187] Citation in usual form showing service omitted in printing.

[fols. 188-190] Certificate of Service and Notice of Appeal (omitted in printing).

this effect, first, the evidence will show that approximately 70% of the eyeglasses in this country are dispensed by optometrists, and that optometrists will not issue prescriptions except in rare instances. They do their own dispensing, whereas the ophthalmologist, on the other hand, by and large does not do his own dispensing, but permits the patient to take the prescription for the eyeglasses he prescribes to an optician, who will then fill them and perhaps have the patient go back to the ophthalmologist for checking.

Now we will show that the effect of all of those things under Section 2 is to take away from the optician part of the functions that he has historically performed, when there is no basis in the interest of public health or welfare to support such a deprivation.

Judge Vaught: What are the particular rights that are taken away from the optician?

Mr. Woods: If your Honor please——

[fol. 205] Judge Vaught: State them briefly.

Mr. Woods: They take away from him the right to fit, adapt or adjust or in any manner apply eyeglasses to the face of a person, except under a written prescription from a licensed practitioner in Oklahoma.

Now that has two effects. First, inasmuch as 70% of the eyeglasses are dispensed by opticians who don't permit their prescriptions to go out to opticians, he is losing 70% of the business there, because when——

Judge Vaught: (Interposing) You mean optometrists instead of—you said opticians when you meant optometrists.

Mr. Woods: Thank you, your Honor. Secondly, the evidence will show that a prescription for fitting, adjusting and adapting to the face is something that is either impossible or highly impracticable to place in writing. You have got to have the patient or the customer before you so you can fit and adjust the glasses to the face.

The second thing prohibits him from duplicating broken lenses, except upon the same conditions I have heretofore announced, with the same effect, as we view it; and thirdly, from placing or replacing the frames, lenses——

Judge Vaught: That is the optometrist you are talking about?

Mr. Woods: The optician.

Judge Vaught: Now then, the optometrist, what does [fol. 206] he do, just briefly?

Mr. Woods: Briefly, the optometrist refracts eyes to determine what the refractive error, that is the visual error, if you will, in the eye is, and he prescribes lenses to correct that error.

Judge Vaught: He performs the same function as a physician?

Mr. Woods: As far as refraction is concerned, he performs the same function as a physician; by that I mean an M.D., a medical doctor.

Judge Vaught: Then in addition to that, does he make the glasses?

Mr. Woods: Ordinarily—he operates in several ways. He may either actually make the glasses himself, or he may have them made by an optical supplier and then in turn receive them back from that supplier and dispense them to the patient, or he may get just the lenses and cut them and edge them and mount them in frames and dispense them to his patient. He can operate in any variation of those three general categories, either completely in the field where he fabricates the glasses himself, or to the other extreme where he gets the completed glasses from the optical supplier and then dispenses them to his patient.

The optometrist, of course, by law, cannot treat eyes for any pathological condition. He is limited to his meas- [fol. 207] urement of the refractive error by law.

Judge Vaught: What do you call an ophthalmologist?

Mr. Woods: An ophthalmologist, if your Honors please, is a medical doctor licensed by this state, who devotes, as I recall, more than fifty percent of his time to eye care, the treatment of diseases of the eye, or refraction, surgery—eye surgery. Oculist is a term sometimes used, and the oculist and the ophthalmologist are really synonymous, but the ophthalmologist is the term generally used to designate a medical doctor who is a specialist in the field of visual care, eye surgery, diseases of the eye, and refraction.

Judge Murrah: Is that all?

Mr. Woods: I also failed to mention one other aspect of this law, if the Court please, and that is as it is written, it prohibits the filling of prescriptions by, for example, an

[fols. 191-194] Motion and Order to Have Original Records in the District Court Transmitted to the Supreme Court as a Part of the Record Upon Appeal (omitted in printing).

[fol. 195] [File endorsement omitted.]

[fol. 196] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Reporter's transcript of Proceedings — Filed February 12, 1954

In the United States Court House and Post Office Building, Oklahoma City, Oklahoma

APPEARANCES:

For the Plaintiffs: Dick H. Woods and John Phillips, (of) Stinson, Mag, Thomson, McEvers & Fizzell, First National Bank Building, Kansas City 6, Missouri; Duke Duvall (of) Dudley, Duvall & Dudley, Liberty National Bank Building, Oklahoma City, Oklahoma.

[fols. 197-198] For the Defendants: Fred Hansen, Assistant Attorney General, State of Oklahoma, Oklahoma City, Oklahoma; James E. Harkin, Assistant Attorney General, State of Oklahoma, Oklahoma City, Oklahoma; Fred Daugherty, First National Bank Building, Oklahoma City, Oklahoma; LeRoy Powers, Office of the Governor, State of Oklahoma, Oklahoma City, Oklahoma; Paul Harkey, Idabel, Oklahoma.

[fol. 199] PROCEEDINGS — October 26, 1953

Judge Murrah: Are the parties ready in Number 6002?

Mr. Woods: Plaintiff is ready, your Honor.

Mr. Daugherty: The defendant is ready, your Honor.

Judge Murrah: Any amendments to the pleadings, last minute amendments to the pleadings, any statement in that respect; the answer has been filed, the pleadings are all closed?

Mr. Hansen: If the Court please, by direction of the Governor, Mr. LeRoy Powers would like to have his appearance entered as an attorney for the defendant in this case. We have the direction of the Governor here.

Judge Murrah: Nice to have you. Do you wish to make a short statement?

Mr. Woods: If your Honors please, I would like to make a brief opening statement.

Judge Murrah: Well, the Court has no disposition to limit you, but we heard you at length the other day; but you may do so.

Mr. Woods: If your Honors please, I would like to summarize some of these issues, because I realize that we went into many of them during the pretrial conference.

[fol. 200] Judge Murrah: Proceed.

Opening Statement by Mr. Woods

Mr. Woods: May it please the Court, in view of, as I said a moment ago, the discussions and the proceedings had last Thursday in the pretrial conference, my opening statement shall be brief and solely for the purpose of pointing out the highlights of the issues as we see them and referring very briefly to an outline of the evidence we hope to present.

Now as the Court knows, this is an action for a declaratory judgment in which the plaintiffs seek a declaration that House Bill Number 953, enacted by the last session of the Oklahoma Legislature, is unconstitutional.

The plaintiffs are two dispensing opticians operating in this state, namely Mr. Carp, who operates as an individual, and Lee Optical Company, an Oklahoma corporation, with its place of business here in Oklahoma City; the third plaintiff is Dr. Oran Rips, a licensed M.D. in the State of Oklahoma, who rents office space from the Zale's Jewelry Company in Tulsa, Oklahoma, in their place of business.

The salient sections of House Bill 953 that are involved in this action are first, Section Number 2, which in summary prohibits any person other than a physician or an optometrist licensed under the law of Oklahoma from fitting, adjusting, or in any manner adapting eyeglasses, frames, lenses, prisms, or any other device intended to aid the human [fol. 201] vision, to the face of any person, except upon a

prescription issued by such licensed practitioner to an optical supplier, in which case the optical supplier, the physician authorizing him by this prescription, may perform those acts.

The section also prohibits the duplication of eyeglasses; by that I mean the duplication of the lens, in the case where a lens is broken. It also prohibits the placing of lenses or the replacing of lenses into frames. Both of those, duplication and replacement, are all prohibited unless covered by a prescription from an Oklahoma licensed practitioner.

Section 3 is the next portion of the statute being involved in this proceeding. That prohibits, I think I can say very generally, all types of advertising by an optician, also of course by ophthalmologists and by optometrists. The exception there to the solicitation for the sale of optical goods is made for the so-called dime store glasses, the glasses with just plain convex spherical lenses.

The third section of the statute in issue here is the provision that prohibits the leasing of any space in a retail type of establishment to a person doing or purporting to give visual care.

If the Court please, our evidence in this proceeding will establish that in the field of visual care there are three main groups: The ophthalmologist, who is the M.D., [fol. 202] and who can both refract and treat diseases of the eye; the optometrist, who under law can only refract; he cannot treat any pathological condition of the eye; and thirdly, and the oldest of those three, the optician.

Our evidence will establish that the optician's history goes way back to medieval times, and from then on forward until sometime early in the 19th century, he was the only man in the field of eyeglasses, making spectacles. Early in the 19th century the ophthalmologist developed as a specialist. About the end of the 19th century, along about 1895, the opticians had a separation movement started in which the so-called refracting opticians, if you will, or optometrists of today, pulled off and separated from the dispensing opticians.

Our evidence will show that in the separation movement of the refracting optician, the optometrist retained a dual capacity, that of refracting eyes which under the law in-

volves professional skill, and secondly, that of selling eyeglasses.

Now the opticians' functions historically and today have remained essentially the same. He is the person charged with grinding, either in whole or in part, the lens blanks that are inserted in eyeglasses, then in cutting and edging, piercing them if necessary to mount them in the frames for eyeglasses. His next important function is taking those [fol. 203] eyeglasses as mounted in the frame and fitting, adjusting, and adapting them to the face of each patient.

Our evidence will also show that the optician traditionally duplicated broken lenses, by measuring the power of that lens by accurate instruments; and fourthly he from time to time either replaces lenses entirely in existing frames, or he may make extra duplicate pairs of eyeglasses.

Those are the functions of the optician as our evidence will establish.

Now the evidence that we intend to introduce to this Court will establish, we believe, that the effect of the prohibitions of Section 953 is to, in a large part, take away from opticians this business that they have traditionally performed, these functions, these acts that are part of their long historical background, and our evidence will establish to you that there is no requirement, no necessity in the interests of public health and welfare for those functions to be removed from the optician.

The evidence that we will introduce, we believe, will establish also that those functions that this law takes away from the optician are being transferred over to the optometrists, a man whom, as I pointed out a few moments ago, occupies a dual position, that of a professional man by virtue of legislation, and secondly that of a merchandiser of eyeglasses; and our evidence will show that a major portion [fol. 204] of his earnings, his income, his livelihood, comes from the sale of those tangible articles of standard merchandise.

If the Court please, our attack upon these sections of the statute is upon these fundamental grounds, first: That Section 2, in prohibiting the optician from fitting or adjusting or adapting glasses to the face, except upon the written authorization by prescription of a licensed practitioner, has

ophthalmologist in Texas or Arkansas or some place by opticians in this state. The requirement of the law is that the prescription must be written by a practitioner licensed by the State of Oklahoma.

Those, your Honors, are the salient features of our case.

Judge Murrah: Mr. Counsel, you have made a very clear and succinct statement of your case. Would it be burdensome for you to have that transcribed for the use of [fol. 208] the Court?

Mr. Woods: Be very happy to do that, your Honor.

Judge Murrah: I don't think it is long and it will not be expensive, would it?

Mr. Woods: Not at all, be very happy to do that.

Judge Murrah: Appreciate it if you do that; the Court will appreciate it.

Do you wish to make an opening statement? If you wish—it's at your pleasure.

Opening Statement of Mr. Daugherty

Mr. Daugherty: Yes, sir, thank you.

May it please the Court, it is the contention of the defendants that the Legislature, in its wisdom, at its last session has seen fit to enact into law a new bill, the type of which is a bill governing and regulating the sale of optical goods.

I pointed this out to members of the Court other than Judge Vaught the other day, but since this is important, I would like to repeat that Oklahoma since 1911 has had an optometry law. Since about that time it has also had a medical law. However, Oklahoma has never had until this last session a law covering the sale of optical goods, and I think it's important for us to keep in mind at all times that this is not an optometry law, it is not a medical law, but it is a new bill covering the sale of optical goods.

Judge Murrah: Proceed.

[fol. 209] Mr. Daugherty: The Legislature has seen fit, by reason of evidence presented to it, to enact a law governing something actually that it hasn't seen fit to enact regulations on before. I think the Court probably knows something about the injunction suit entered in Illinois in 1950 against the major optical supply companies, wherein

the doctors were enjoined from receiving rebates, and in that injunction may it please the Court, these major optical suppliers were enjoined from dispensing for ten years.

As a result of that action, a number of these so-called dispensing opticians, most of whom had perhaps been employed by these major companies, others sprung from various other sources, only in the past few years; and they have opened these stores and they have started contacting the public, and they have entered into the field of visual care.

Now we agree that the optician's is an ancient art, but the conditions existing in this state and through the entire United States as a result of this injunction, are of recent origin, and our Legislature has just seen fit to bring this regulation into the law of this state.

Now Section 1 and Section 2 of the law I think might be discussed together. The law itself speaks very well. I think it is clear, and I think with such evidence as we need, which will be minor, that this law will definitely [fol. 210] show that the Legislature has deemed it necessary to the people that the people receive the best possible visual care through the efforts of ophthalmologists or physicians, and optometrists, and that it prohibits unqualified people from visually correcting for compensation the eyes of another.

The second section, reading it in conjunction with the first, provides that these optical suppliers, these dispensing opticians, must operate under professional supervision, the same as a doctor's nurse does, the same as a pharmacist does. The Legislature has seen fit not to license the opticians and have them examined as is the case in some of the states; rather, the Oklahoma Legislature has seen fit in the protection of the public to see that these nonprofessional men, who deal with the human eye, do so under the written prescriptive authority of a professional man, who by this law is responsible for his patient's welfare.

We feel that that is a reasonable enactment by the Legislature for the protection of the public, that it has a direct bearing in relation to public health and public welfare, and the evidence will show some of the abuses that

have sprung up as a result of this injunction in the past few years, to where the people now are entitled to protection against nonprofessional treatment of the eye.

Now this measure, if you want to boil it down to its most simple statement, is a measure designed to see to it [fol. 211] that the care of the eyes of the people of Oklahoma is applied professionally and not commercially.

Judge Vaught: I haven't even read your pl adings in this case, so it is all new to me. What do you say to that portion of the Act which would prevent the optician that made the glasses under a prescription by a medical expert, if the patient should break one of the lenses but couldn't take it back to the same optician who made it originally and have it replaced without an additional prescription?

Mr. Daugherty: The law does not require an additional prescription, your Honor. The law merely requires that the optician who undertakes to duplicate have on file in his office the prescription by a professional man for that eyeglass. He doesn't have to go back for a new examination, your Honor, but he must have in his office the prescription of a doctor for that set of glasses in order to duplicate, that doctor being responsible for the care of that patient's eyes; and the evidence will show that you can get a much better, a more accurate duplication from a prescription than you can from the duplicate of the prescription.

Simply, if you are going to copy a masterpiece, you could make a better copy by copying the masterpiece than you would have copying the copy of the masterpiece.

Judge Vaught: Do you contend then that there is noth- [fol. 212] ing that would prevent the optician from making a duplicate pair of glasses, if he had the prescription in his office?

Mr. Daugherty: No, sir, if he's got the prescription he can fit, he can adapt, he can adjust them, he can grind the lenses, he can put them to the face, he can duplicate a lens, he can replace the frame, he can do any of those things, your Honor, so long as he has got the written prescription from a professional man, whom the Legislature has seen fit to give full responsibility for the care of his patient.

Judge Vaught: Do you place the optometrist in the same

position as the ophthalmologist, so far as qualification to write a prescription?

Mr. Daugherty: As far as the examining of the eyes for glasses, yes, sir. I think it will be admitted that both the ophthalmologists and the optometrists are qualified professionally to examine the eyes and prescribe glasses for the eyes.

Judge Vaught: What qualifications does the optometrist have?

Mr. Daugherty: An optometrist in the first place in Oklahoma must meet educational requirements, moral requirements, he must pass an examination, he must be licensed, he is regulated by a board. The course of instruc- [fol. 213] tion is a five year course, being extended to six; and he receives a very intense course in his field. Now he is not only qualified to make an eye examination, but he is trained to detect diseases of the eye. He doesn't treat them. He refers them to a medical doctor who does, but his training with respect to the eye, particularly with refractions, is very, very complete. He is a licensed professional man, and the courts have held optometry to be an unquestionable profession and the plaintiffs admit that.

Judge Vaught: Under the law he could make glasses if he wanted to, couldn't he?

Mr. Daugherty: He could do it; most of them do not, sir.

Judge Vaught: What distinction do you make in his qualifications now to make glasses and the opticians'?

Mr. Daugherty: May I say this, your Honor: The normal practice of the optometrists is to make an examination and reduce that to a prescription, and they send that to a supply house who grinds the lens, puts it in the glasses and sends them back, and the optometrist puts them on the face of the patient, adjusts them. Now the optician, he grinds the lenses and in that kind of an operation, if he is a good optician, why he does the job well. If he doesn't do it well, the optometrist checks it and sees that it is done properly.

The optometrist normally uses a supply house optician. [fol. 214] He's up on the second floor, let's say.

The ophthalmologist normally uses a dispensing optician, prescription goes down to a dispensing optician, and I believe you will find that in most cases the dispensing opti-

cian does not do his own grinding; he sends the prescription to the same supply house that the optometrist sends his to, and gets it back, and he fits it to the face; so the dispensing optician, and that is what these plaintiffs are, except Dr. Rips, are not grinders of lenses, and other people like them perhaps are not, but they may grind, but in most instances they do not grind their own lenses.

So you may have an optician to grind lenses in a laboratory, you may have an optician who dispenses but does not grind.

Judge Vaught: Do you take the position that the optician, after the lenses have been ground, is not in a position to determine whether or not they have been properly ground?

Mr. Daugherty: No, sir, I don't think we take that position, your Honor. We take the position that so long as the optician, whether he be a supply house optician or a dispensing optician, so long as he has the written prescriptive authority of the professional man in the case, that he should be permitted to grind the lens and to fit and adapt and adjust and to duplicate thereafter if necessary.

[fol. 215] Judge Vaught: And dispense them?

Mr. Daugherty: And dispense them, yes, sir. That's the law. This law does not put the dispensing optician out of business. It merely—the Legislature could have done one of two things, in my opinion. They could have either passed a licensing bill where these opticians would be examined and licensed and regulated by a board, in which case they might not need this provision where they must operate under the care and supervision of a professional man; or the Legislature could have done as it did and put these non-professional people, dealing with public vision, put them under the supervision of the professional man who makes the examination and who is responsible for his patient's eyesight. That is all this law does.

Judge Vaught: You conclude then because the optician is not licensed the same as the optometrist, that he should not be permitted to exercise this particular function?

Mr. Daugherty: I don't say that, sir. I say the Legislature had two things it could have done with the same result, and it has gone this way, which we feel gets the job done, the main purpose being to see that the people get professional care for their eyes.

Judge Vaught: Well, sometimes that's the object of a law, and sometimes it's to assist another class.

Mr. Daugherty: Yes, sir.

[fol. 216] Judge Vaught: Now another thing: You have an exception here counsel mentioned. Now you go down to the T. G. & Y. store or one of the five and ten cent stores and you can buy a pair of glasses.

Mr. Daugherty: Yes, sir, those are magnifying glasses, your Honor, which the customer picks out, and there is no fitting to the face by the seller of those glasses. That exception is supported by decisions in other states, for it has been held to be a reasonable, valid exception. The purpose applies to the dime store, where a person goes in and buys a pair of glasses, and there is no attempt made to fit the glasses to that patient's face. He selects them at his own discretion. He is fully responsible and no one else is responsible, but those glasses, your Honor, are magnifying glasses. They do not correct the vision other than magnify. They don't prescribe one kind of lens for one eye and one for the other, and they are not adapted to the face.

When a patient has his eyes visually corrected by a professional man, that professional man under the law is responsible. If anyone else is going to do anything that may harm that man's vision, he must do it under the direct authority of a professional man, much as a doctor's nurse performs under the professional man, and if the doctor's nurse makes a mistake, the doctor is responsible; much the same as the druggist who pursuing the written prescription [fol. 217] of a doctor, and in the case of a druggist you can't take your bottle with the number and go to another drug store and get it filled. It's filled on written prescriptive authority, and that is the law.

Now this law parallels that very much. We will bring to the Courts' attention a dentistry case here in Oklahoma, where the dental laboratory technicians who make the bridgework, teeth and things of that kind, it's been held to be just like an optician should be; he works under the dentist, the dentist is responsible. He can't practice dentistry. This case went to the Oklahoma Supreme Court, and it's a very strong analogy. I won't burden the Court with it now, because I think it will be proper to do so later;

but that is how our Supreme Court feels about the professional care of a bodily ill.

Does the Court have any other questions on that particular point?

Judge Vaught: No.

Judge Wallace: Mr. Daugherty, Mr. Woods made the statement that the bill provided that no doctor outside of Oklahoma could write a prescription and that could be filled, as I understand it. What is your reaction to that statement?

Mr. Daugherty: The law provides that a person fitting glasses must be licensed under the laws of Oklahoma. I believe that Oklahoma can require that professional care [fol. 218] given in Oklahoma should be done by Oklahoma licensed practitioners. I feel that is the basic law.

Judge Murrah: Do you say or do you agree that in Oklahoma the law in question does have the effect of imposing that restriction?

Mr. Daugherty: I would not go that far, your Honors. I think that would be a matter of interpretation.

Judge Murrah: Well, what is your interpretation?

Mr. Daugherty: Well, I don't think the Legislature, perhaps, intended to be quite that strict. It has defined a professional man.

Judge Murrah: That is important and it will be necessary for you to take a stand on it one way or the other. You will not be required to do so at this moment. Certainly the Court will want to know.

Mr. Daugherty: Yes, sir.

Judge Murrah: From the pretrial conference, at least one member of the Court gained the impression that it would be your position that the law did so limit the use of prescriptive authority.

Mr. Daugherty: Yes, sir.

Judge Murrah: You may—you are not bound by this; but I'd like to ask one question which seems to be in order. Will it be your contention that, your interpretation of the statute, that prescriptive authority required under the Act [fol. 219] must be directed to one designated or named optician?

Mr. Daugherty: That is not our position.

Judge Murrah: You will not contend that a prescription issued by one authorized to do so must be directed to any specific optician?

Mr. Daugherty: It must not be directed to any specific optician. It may be given to the patient. He can take it to the optician of his choice.

Judge Murrah: That will be your position?

Mr. Daugherty: That will be our position; with the responsibility, however, for the full effect of any appliances furnished remaining with the doctor.

Judge Murrah: Do you speak for the Attorney General on that point?

Mr. Hansen: Yes, your Honor, that is correct.

Judge Wallace: Let me ask you this question, Mr. Daugherty: With regard to the advertisements that you spoke of, Mr. Woods spoke of, and that the opticians as I understand under this Act 953 cannot advertise in many ways. He is prohibited. Is it your theory that that does not violate, for instance, the Interstate Commerce law or Section 15 of the Constitution?

Mr. Daugherty: That's right, we do take that position, your Honor. We take the position that the right to advertise is not an absolute right, and that it may be regulated [fol. 220] or entirely taken away in the interest of public health and welfare. We feel that is the basis under which the Oklahoma Legislature has seen fit to prohibit all forms of advertising in the field of visual care. There is ample authority for that. I think the last count I made there are twenty-seven states that have regulations prohibiting advertising in the field of visual care. With the exception of a city ordinance in Detroit, those have been upheld. The most recent being in the State of Louisiana, which has just recently been upheld as being a valid exercise of police power in the interest of public health and welfare.

We feel that that is certainly a valid exercise and the abuses that come from advertising glasses and visual care, and so forth, will be explained from the witness stand, I think justifies the Legislature in exercising this prohibitory power.

Judge Wallace: You agree with Mr. Woods in regard to classification of, say, the ophthalmologist, that he is one

that exercises pathological examination of the eye, and that the optometrist, the only thing that he does is to refract, and the optician, of course, does not do either one of those, but merely fits and so forth, grinds to the correct sphere of the work that he is doing?

Mr. Daugherty: I think that's correct, your Honor, with the possible exception of the fact that the optometrist is [fol. 221] trained to detect the diseases of the eye and refer them to a medical doctor for care and treatment or surgery.

Judge Vaught: I might ask you one other question: Now if the optician doesn't grind the lens, if he sends them out, what is his use?

Mr. Daugherty: His use is to, perhaps, fit them to the face. That's about all that he does, your Honor. He may check the lens as it comes back from the supply house to see that the prescription is filled, and then fit the glasses to the face. He should do that pursuant to and under the authority of a professional man.

Judge Murrah: Is that his function, the filling of the prescription that you speak of, the sole function?

Mr. Daugherty: His sole function?

Judge Murrah: Yes. I understand, I am sure the Court understands, the law provides merely that he shall in grinding, fitting, and performing mechanical functions incident to eye care—he may do all of those under the prescription?

Mr. Daugherty: Yes, sir.

Judge Murrah: Under a prescriptive authority?

Mr. Daugherty: Yes, sir.

Judge Murrah: I am trying to fit that concept into your statement just made to the effect that all he would do would be to fit the glasses to the face.

Mr. Daugherty: If he didn't grind?

[fol. 222] Judge Murrah: If he didn't grind.

Mr. Daugherty: If he's qualified, he can grind or if he holds himself out or does grind, if he is qualified he can grind. If he doesn't, it would be my idea the so-called dispensing optician who doesn't grind but sends them to the supply house, when he gets them back he will probably check the lens to see that the supply house has filled the prescription. He would then put the glasses on the patient's face to fit and adapt and adjust those. My personal opinion is

that that is what he would do if he didn't do his own grinding.

Judge Murrah: Is there anything to prevent the optician from maintaining, being also a supplier?

Mr. Daugherty: The grinder?

Judge Murrah: Yes, the grinder.

Mr. Daugherty: No, sir.

Judge Murrah: Anything else?

Judge Wallace: The question was raised there, I think by Judge Vaught, with regard to the convex spherical glasses that are sold probably on the counter at various stores. Now are they permitted under this Act to advertise and so forth?

Mr. Daugherty: I would not think so, sir.

Judge Wallace: They couldn't advertise their wares, binoculars and things like that?

[fol. 223] Mr. Daugherty: I think they could advertise those items, yes, sir.

Judge Wallace: Can an optician do that, can he do the same thing?

Mr. Daugherty: On binoculars I would think so, wouldn't you?

Mr. Hansen: Yes, sir.

Judge Wallace: What about the rental, what is your attitude on that question?

Mr. Daugherty: My attitude, our attitude on that, your Honors, is that going further beyond the advertising prohibition the law prohibits rebates, it prohibits the solicitation of business for doctors by optical suppliers and it prohibits an eye examiner, that is an ophthalmologist or an optometrist, from making an eye examination as an employee of a lay person or group.

Judge Vaught: As a what?

Mr. Daugherty: Make eye examinations for a lay person or a lay group. In other words, it's what we call corporate practice, prohibition against corporate practice, to where the eye examiner is prohibited from—I will read it here: (Quoting) Unlawful for any optometrist or physician to make an eye examination as an employee of a person, firm, corporation, lay body or lay group—and then the inverse, is that it's unlawful for a lay group to procure an examination

[fol. 224] through the hiring of a doctor. That is a prohibition against corporate practice in an effort to keep eye examinations on a professional basis rather than a commercial basis. That would prevent an optician from hiring a doctor and having a doctor make eye examinations.

Now the renting of space, to get to your question, your Honor——

Judge Wallace: I want to distinguish between—Judge Murrah says here you can go down to the T. G. & Y. where they have these things displayed, now they can advertise that. An optician may have those same things, but you say he can't advertise them?

Mr. Daugherty: I believe the Court misunderstood me. I don't think under this advertising prohibition that anyone can advertise the sale of glasses. It so says—no one may advertise or solicit the sale of spectacles, eyeglasses, eye examinations, or visual services. The Court may or may not agree with me on that, but it seems like that is——

Judge Vaught: (Interposing) Take the T. G. & Y., since that designation has been used. If they sell glasses, just as they sell any other merchandise in the store, why wouldn't they have a right to advertise the same as they would any other sale?

Mr. Daugherty: Why wouldn't they have the right to [fol. 225] advertise the sale of glasses? Well, in the first place, the Court may not agree with my interpretation of this provision; secondly, may I say that the whole purpose of this Act, your Honors, is to get visual care of the people of Oklahoma in the hands of professional people who are qualified to give good visual care, and not to let visual care fall into the hands of untrained, unqualified, and unregulated people, who will not give to the people of Oklahoma proper eye care at the proper figure. As I said before, the bill must be considered from its four corners.

Judge Vaught: You are assuming that there is a class in this state that is so conducting its business as not to protect the health of the people?

Mr. Daugherty: I am assuming that the Legislature in its infinite wisdom has found that condition to exist and has legislated against it.

Judge Vaught: I am never questioning the infinite wis-

dom of the Legislature, but just asking you what your position is. Now the one class here that would be affected by this law is the optician, isn't it?

Mr. Daugherty: To a certain extent he is affected, but he is not limited from practicing. The thing he is now required to do is work under the prescriptive authority from the professional man. He is prohibited from doing things that deceive the public to believe he can give eye examina- [fol. 226] tions, fit glasses, which also means causing the public to go to the doctor instead of commercial enterprises where they are not qualified to give him an eye examination. He is affected to that extent, your Honor. It doesn't put him out of business. He wasn't out of business in 1950. They do business on prescriptive authority. That's the way it was up until that time.

Judge Vaught: I assume that is one of the questions that will be covered by the evidence.

Mr. Daugherty: Yes, sir. To answer Judge Wallace's question about renting space: I think that is an extension of the prohibition against corporate practice, and is put in there for the purpose of preventing secret agreements, secret arrangements, subterfuges in avoiding corporate practice or obtaining corporate practice in a sub rosa manner, and that is the reason that I feel that provision is put in there. It belongs very definitely to all of the other provisions of that section, which are aimed at keeping eye care on a professional basis, and to avoid commercial control and influence when the care of the eyes is concerned; to get back to the first two sections, so these people that do optical work and so forth are merely required to do it under the direction and authority and the responsibility of the professional man.

Again, as I say, if I had to boil this law down to a [fol. 227] shortest substance, I would say that it is a bill passed by the Legislature in the exercise of its police power for the purpose of seeing that eye care is maintained on a professional basis of responsibility and is not taken over by commercial interests.

Judge Murrah: Is that all?

Mr. Daugherty: That's all.

Judge Murrah: The Court has extended your argument

probably further than you anticipated, but would it be burdensome for you to transcribe that, your statement? I am sure that it will be beneficial to the Court. However, we don't want to impose on you to the extent of——

Mr. Daugherty: Be glad to do that, your Honor.

Judge Murrah (Continuing:) —of being burdensome.

Mr. Daugherty: I believe the State can afford it.

Mr. Woods: If the Court please, I would like to make just two brief observations in reply to what Mr. Daugherty has said.

First, as I understand, the State takes the position that under Section 2 the prescription does not have to be directed to any specific optical supplier. I want to make this observation in connection with that: They also say and recognize that that same section provides that the physician is liable for the spectacles or eyeglasses issued under that prescription. Our evidence will show that the effect of that [fol. 228] is to deny and remove from people like plaintiffs the right to compete for that because the physician, being legally responsible for the acts of the optician, is going to send that prescription only to one optical supplier.

Now you can lay aside the optometrist, because the evidence will show except in rare instances that they never issue a prescription, so it boils down to the fact that you are forcing the ophthalmologist to specify in his prescription the optical supplier who is going to fill that, and if you do that, then you have effectively removed the right to compete in that field of business from the opticians.

The second thing I want to make clear is that as I understand, the law of Oklahoma prior to the enactment of House Bill 953 required a prescription to an optician from either an optometrist or a licensed medical practitioner, an ophthalmologist, before eyeglasses could be formulated. Those are the two remarks I wanted to make.

Judge Vaught: Let me ask you this question: Now if under the law prior to the enactment of this law, it was necessary for an optician to have a prescription before he could get the glasses, what was the purpose of this law in regard to that point?

Mr. Woods: It is our contention, if your Honors please, that the purpose of this law is to remove from the optician

his function of fitting, adjusting and adapting glasses to [fol. 229] the face, among other things, the duplicating and replacement.

Mr. Daugherty: If Judge Vaught addressed that question to me about how the law was changed, the rule before was not codified in the statutes, your Honor, requiring a——

Judge Vaught: (Interposing) What?

Mr. Daugherty: The rule that the optician must have a prescription to fit a pair of glasses was not the codified law of Oklahoma prior to this law. I know the Attorney General's Office may have construed the optometry and medical——

Judge Vaught: (Interposing) I didn't understand.

Mr. Daugherty: I understand that it was not in the formal statutory law prior to this law.

Judge Murrah: Well, I think that perhaps that will be a part of your argument of your case. It may be controversial. Now are you prepared to proceed with your testimony?

Mr. Woods: Yes, your Honor.

Judge Murrah: Call your witness.

Mr. Woods: Call Dr. Coston, if you please.

Tullos O. Coston, called as a witness on behalf of the plaintiffs, being of lawful age and having first been duly sworn, testified as follows:

[fol. 230] Direct examination.

By Mr. Woods:

Q. Will you state your name, please, sir?

A. Tullos O. Coston.

Q. And are you a licensed medical practitioner in the State of Oklahoma?

A. Yes, sir.

Q. Do you specialize in any particular branch, Doctor?

A. Ophthalmology.

Q. Doctor, I will ask you, are you appearing voluntarily today?

A. No, I come as a result of subpoena. I would like to make this statement at the outset, that my presence here in giving testimony in no way indicates that I approve of all of the practices of the Lee Optical Company, the plaintiff.

Q. Very well. You say that your practice is that of an ophthalmologist?

A. Yes.

Q. Would you just very briefly and generally describe what the practice of an ophthalmologist is?

A. Well, it consists of examining, diagnosing, treating various diseases of the eyes, as well as doing refraction and prescribing proper glasses. The treatment may be medical or surgical, consists in consultation cases sent by other physicians and helping to make diagnoses of general illnesses.

[fol. 231] Q. Yes. Doctor, would you state for the record your medical education and your experience and also any societies that you are a member of or have served on?

A. Well, I graduated Johns Hopkins Medical School, 1930, had an internship in emdicine one year, four years' training in ophthalmology at the same institution, and one year on the staff of Johns Hopkins University and Hospital. I have practiced, in Oklahoma City, ophthalmology since 1936.

Q. Yes, sir.

A. I belong to the County and State Medical societies, the American Medical Association, the Academy of Ophthalmology, and the Johns Hopkins Surgical Society.

Judge Murrah: The Court will take judicial notice that the witness is an outstanding, pre-eminent ophthalmologist.

Mr. Daugherty: We admit the——

Judge Murrah: (Interposing) Not only in Oklahoma but the whole country.

Mr. Woods: Very well, your Honor.

By Mr. Woods:

Q. In the course of your practice, Doctor, do you do refractions?

A. Some refractions.

Q. When you have refracted a patient's eyes, tell me what you do.

[fol. 232] A. After I arrive at——

Q. (Interposing) Your conclusion.

A. Write out a prescription. If the patient needs glasses, a prescription is written for the glasses on one of my prescription blanks, and given to the patient. He is told to take that to a dispensing optician, several of whom I give him the names of. If he wishes to know a specific one, knowing no one, I tell him where they are located. He usually chooses one by the location; and if he wishes me to name one specific one, I name one to go to.

Judge Vaught: What do you mean by "refraction"?

The Witness: Fitting of glasses.

Judge Vaught: Fitting of glasses.

The Witness: That's the term we give to the measaring of the eye for glasses.

Judge Vaught: That's when you examine him and have him to read that little card at the far end of the——

The Witness: Yes, sir, that's part of it.

Judge Murrah: That does not necessarily include a pathological examination?

The Witness: Oh, no, that's only a small part of the complete eye examination.

By Mr. Woods:

Q. By refraction you measure what the refractive error of the eye is; is that not in a general way what's done?

[fol. 233] A. In general.

Q. And when you have found that refractive error, you can correct or compensate for it by the prescription of the proper lenses?

A. Yes.

Q. Am I correct in that statement?

A. (Nods affirmatively)

Q. Now Doctor——

Judge Murrah: (Interposing) The answer is yes?

The Witness: Yes, we give the glass that will either make the patient see better or make him more comfortable, or in a case of a cross-eyed child, it may help in straightening

the eyes. There are three reasons to wear glasses. One is to make a person see better. He can wear them or not wear them as he chooses. The second reason is to allay some headache or some eye ache, some discomfort that he has; and the third reason is to help any correction of cross-eyes. Outside of sunglasses and protective industrial glasses, which I am not referring to, those are the only three reasons to wear glasses.

By Mr. Woods:

Q. In that connection, Doctor, if a person has a refractive error in his eye, and doesn't obtain glasses, is his eye going to be damaged or injured in any way?

A. There will be no change in the anatomical structure [fol. 234] of the eye, there will be no damage whatever whether he wears proper glasses or does not.

Q. Is it primarily that he won't see as well as he would if he had proper glasses?

A. He may not see as well, or may have headaches or he may be uncomfortable, but the fact that he needs some glass that he doesn't have, or if he is improperly fitted, even, it does not damage the structure of the eye in any permanent way.

Q. Now Doctor, when you write a prescription, what do you ordinarily include in that prescription?

A. Well, you have the patient's name and date, and you have the strength of the lens, spherical strength, maybe, only, maybe there's a cylinder in there, maybe a prism, may have an addition for reading; he may have two pair of glasses, he may have bifocals. You may indicate sunglasses if he desires, and you may indicate the type of bifocal, if you think it best if he needs bifocals. In a high refractive error you indicate, I usually indicate the distance that the lens sat from the eye when I measured the error in my office so the optician will know what distance to place the strong lens, or compensate for it if he can't place it the same distance I had it in my trial case.

Q. By "compensate for it", you mean if it's moved outward or moved in, he will change the power of the lens? [fol. 235] A. If he has to set the lens closer to the eye than I did at the time I refracted the patient, he will have

to compensate by tables and make the glass stronger or weaker in its spherical correction for that reason.

Q. You have the optician do that compensation?

A. Optician does all of that.

Q. Do you include in your prescriptions ordinarily anything with respect to the frame?

A. No.

Q. Do you include in your ordinary prescription anything about the distance between the pupils of the eyes?

A. No.

Q. To whom do you leave the responsibility for measuring that so-called interpupillary distance?

A. That is the responsibility of the optician.

Q. And what about the frame, the type of frame, the selection of that?

A. Someone has to show the patient various frames for their selection. That is a very important point to the patient. Any frame would satisfy me, if he has the proper frame to hold the glasses, but the patient is very, as all of you know who wear glasses, is very conscious of the frame. Someone has to merchandise them, someone has to present them and to show them, and that is a function of the optician to the ophthalmologist. He serves us in that way.

[fol. 236] Q. Yes, sir. Do you put anything in your prescriptions pertaining to the fitting, adjusting or adapting of the frame to the face?

A. No.

Q. And on whom do you depend for that fitting, adjusting and adapting, Doctor?

A. The optician.

Q. Doctor, do you happen to have one of your prescription blanks here? Could you give an example to the Court of a typical average prescription that you would write?

A. I don't have one. I will write it on a piece of paper.

Q. All right, sir.

Judge Vaught: Better make it "John Doe", Doctor. Someone might use that.

The Witness: All right.

Judge Murrah: Proceed.

By Mr. Woods:

Q. Doctor, would you state how that prescription was written and in general what the information is on that?

A. You want me to read these figures?

Q. Yes, if you will, please.

A. Well, Mr. John Doe, October 26, 1953, RX—our symbol for "I prescribe"—distance, sphere plus one twenty-five, cylinder; sphere, that's the right eye, and sphere plus one fifty, the cylinder plus twenty-five at one [fol. 237] eighty, left eye; and near—means the amount of correction added to that the patient must have to read with, add plus two twenty-five each, Ultex B. bifocal.

Mr. Woods: Would you mark that, please?

(Plaintiffs' Exhibit 1, being the prescription prepared by the witness, was marked for identification.)

By Mr. Woods:

Q. You mentioned a cylinder and a prism in connection with prescribing eyeglasses. Would you explain just very generally what a cylinder is and what a prism is?

A. Well, a cylinder is a lens ground in such a manner as to correct astigmatic error. Now astigmatism means that the eye is lopsided. It is not quite round. That is usually a fault of the cornea, of the front round surface of the eye; may be in the lens but usually the astigmatic error is a result of the irregularity in shape of the front of the eyeball. The lens can be ground in a way to counteract that because the rays come in at bent angles, and the lens which we call a cylinder has a correction only in one meridian, and that will correct by, after we have tested for the proper meridian, it will correct the astigmatic error. When I say "correct", I mean it counteracts in the glasses. It doesn't change the physical fact that the astigmatism still exists in the eye.

A prism is a grinding of the lens in a way to displace the image. One may have a muscular imbalance in the eyes making the right eye higher than the left, or tending [fol. 238] to go higher than the left, due to a weakness or imbalance in the muscles, and the prism simply allows the

eyes to remain more one above the other and still have comfortable binocular single vision because it displaces the image as it comes into one eye or the other and allows the eye to have less strain, less pull.

Q. Now Doctor, I believe you also a little while ago mentioned something with respect to high power lenses or high correction; what do you in general refer to in that?

A. Well, most lenses that I would say are high errors would be over two, three, four on up, three or four diopters and over are getting to be fairly high corrections. Below that, moderate, and below one diopter, slight correction.

Q. Is it true or is it not true that as the power of the lens increases, then there is a little less tolerance so far as any error in the grinding of the prescription?

A. That's true.

Q. What percentage of prescriptions for eyeglasses, in a general way, are of high power lenses as you would term them?

A. I wouldn't know exactly, but the percentage of refractions over three or four diopters would be maybe ten percent, or less.

Judge Murrah: Ten percent?

The Witness: Ten percent or less.

[fol. 239] By Mr. Woods:

Q. And the bulk of the balance would then be lower powers?

A. (Nods affirmatively.)

Q. Going back to your acts that you would perform you have related that you would give a prescription such as Exhibit 1, as an example, to the patient?

A. (Nods affirmatively.)

Q. And the patient would then take that to an optician for filling?

A. (Nods affirmatively.)

Q. Would you request the patient to come back to you for checking of that prescription?

A. Well, I have the patient come back if it's of a high error, where a difference in the center of the lenses would make for more discomfort to the patient.

Q. Now in the difference in the centering of the lens, are you referring to the pupillary distance?

A. Pupillary measurement and the grinding of the optical centers in proper place.

Q. In cases where you have not prescribed high power lenses, I take it you do not request the patient to come back, necessarily?

A. No, the glasses are all brought back to the office and they are checked on the lensometer for strength, and the patient is told if he has any discomfort or any difficulty, he [fol. 240] is to return, but the low errors, the patient is not seen with the glasses.

Q. Yes. Who does the checking on the lensometer in your office?

A. One of my secretaries is trained to use the lensometer, and if she finds any discrepancies, she calls one of us to check.

Q. Now Doctor, are the practices that you have related, you have told in connection with the prescription of eyeglasses, the practices that are generally followed by ophthalmologists in the State of Oklahoma?

A. I would say so.

Judge Murrah: Say so?

The Witness: Yes; I would like to qualify that to this extent, the ophthalmologist practicing in the smaller towns, where there is no optician available, he has to be the optician, the ophthalmologist, and all. He has to show the frames, sell the frames, fit them to the face, and see the patient with the glasses later and so on. He is the only one to do it, and there are many of those men in our state, but where opticians are available, the practice is generally as I gave it.

Judge Murrah: The ophthalmologist?

The Witness: Yes, sir.

Judge Murrah: Sometimes he is also a dispensing optician, or that is to say he sometimes dispenses, he grinds [fol. 241] and dispenses?

The Witness: He doesn't grind. He does do the duties of the ophthalmic dispenser.

Judge Murrah: But he does have them ground?

The Witness: He sends them away to be ground.

By Mr. Woods:

Q. Doctor, would you state what part, if any, the ophthalmic dispenser, the optician, occupies in the field of eye care, from the ophthalmologist's point of view?

A. Well, he's very much to us as the pharmacist. However, there was a time when the doctor had to compound and make up all of his pills and medicines, and a doctor could still do that if he desires to do that, but it's so convenient, it's so modern, we have come to a different day in medicine now. In ophthalmology, the ophthalmic dispenser is to the ophthalmologist what a pharmacist is to the general physician, and what the pharmacist is to us. We prescribe many medicines. We have no time. If I had to get these patients down and fit their frames and merchandise the frames, and show them the different types of glasses and have them back and fit them, then adjust them every time they knocked something crooked about the frames and they came to me to have that done, I would neglect many serious problems in very great need of attention. The ophthalmic dispenser is one of our right arms as practicing modern ophthalmologists.

[fol. 242] Q. Is he a necessary element of that practice?

A. Well, he's very necessary.

Q. Doctor, in your opinion, is it necessary for the optician to have the training and the educational background of an ophthalmologist to properly perform these functions you have related?

A. No.

Q. And is it necessary for that optician to have the educational training of an optometrist to perform the functions you have related that he does?

A. No.

Q. In your opinion, how would you describe the order of the acts of the optician, what is their nature, how would you classify them?

A. Well, the dispensing optician takes the ophthalmologist's prescription, and he interprets it as to the lens, has the lens ground according to the prescription. He shows the patient the various frames. After the selection of frames, if new frames are bought—he may not sell new frames, he may take the old frame, but measure the pupil-

lary distance to be certain that the old frames are correct, see that the lenses are going to be ground according to the proper centering. In other words, he settles the question of fitting of frames, the selection of frames. He has the lenses he does grind in his own shop, many of them do that in larger areas. In smaller areas the dispensing op- [fol. 243] tician doesn't often have a shop, but he sends it away; but he is responsible for the proper lens strength as we have ordered. That is sent back to him. He puts them in the frame and in other words, he mounts them. He has the patient come back and he puts the frame on the face. He adjusts and adapts, and is certain everything is centered properly, the frames are the proper size, and that they are comfortable; and in general that is his function.

Q. What type of activity or skill on his part is required for those functions?

A. Well, quite a high degree of skill. It takes a considerable amount of skill to fit frames, adjust glasses, and have all of that mechanical measurement and performance done properly.

Q. In your opinion, is that of the same order as a professional man's knowledge or education required?

A. Not a learned profession, no; but a skilled craft.

Q. Skilled craftsman?

A. Yes, sir.

Q. From your experience as a practicing ophthalmologist, in what manner would you say opticians generally perform those functions, in comparision with for example optometrists or ophthalmologists?

A. Well, ophthalmologists are not trained to perform those functions except in rare instances. Opticians are [fol. 244] quite well trained to perform those functions, proper opticians. The optometrist has training in that field also in the course of training. As to what extent the optometrist, how you could compare him with the optician in such skill, I have no personal knowledge, but it would seem reasonable that one performing these duties only would be more highly skilled in it.

Q. And you are referring then to the optician?

A. Yes, the optometrists are going more and more to examination of the eyes and diagnosing diseases, and they

are getting more and more away from that very thing themselves.

Q. By your testimony you mean that an optician acquires greater skill and dexterity from the frequency of the work he does?

A. I would think so, definitely.

Q. Doctor, with respect to the duplication of broken eyeglasses, how in your practice is that handled?

A. Well, if the patient has been examined only recently, by recently meaning in six or eight months, and he is not having any discomfort, he is told to have the lens replaced by the optician who ground them who has the prescription on file. If he doesn't want to do that, we have the prescription on file in our office and the history of the case. If it's been some time since he's had his eyes examined, [fol. 245] and it would be natural to assume that he might need a reexamination, very frequently in my practice we are just too busy to do it that day. He may have a very important day in court coming up and he needs glasses. He is told to have the old glasses replaced, make an appointment as soon as we can get to him, or go to someone else if he had rather, but for the moment he is told to have the old lens replaced as soon as possible, then have the eyes reexamined.

Q. Now can you state just in a general way what is done in replacing of that lens by the optician?

A. The optician may do one of several things. He may call the physician's office who prescribed the glasses. That is the general custom, if he knows who it is. He calls the office and if it's in the city, and finds out what the prescription was, if he didn't fill it originally. If the patient doesn't know who ground the glasses, or if he's from out of the city, out of state, if he has enough of the lens, broken lens, he can determine on a lensometer the strength of the lens with a sufficient amount of the lens. He can't tell with a *g*ragment and grind the glass. He can't do that in all cases. A broken lens—he may not be able to determine something about the axis of the cylinder and so on, but he can do it in that way if he has enough lens, we will say a piece of lens big enough.

Q. And with the exception of these instances that you

[fol. 246] have mentioned, which I take it are relatively infrequent, it is a correct measurement, is it not?

A. Oh, it's very, very close; close enough to be within the tolerance of the eye.

Q. You mentioned the tolerance of the eye. Would you state for the Court whether or not the eye has a great tolerance or a small tolerance.

A. Well, the eye has a considerable tolerance, which will vary from patient to patient, but a considerable amount of tolerance as to a proper or an improper lens.

Q. State whether or not an improper lens or an error in the grinding of the lens can cause permanent injury to the eye of a person.

A. An error in the grinding of a lens could not cause any permanent damage to the structure of an eye.

Q. Doctor, I will ask you if under the law of Oklahoma, you are held liable for the glasses dispensed pursuant to a prescription of yours, will you issue prescriptions and permit them to be taken to any optician that patient might choose?

A. No.

Q. What will you do if that is the situation, assuming what I have said is the law?

A. Patient will be directed to an optician I know to be reputable and reliable.

Q. Now some mention has been made of the type of [fol. 247] glasses sold by T. G. & Y. stores, or dime stores. would you explain just briefly what those glasses are?

A. Well, they are spherical glasses which enable the individual, if he happens to have the type of eyes that those glasses will help, they help him to see better. Maybe he needs only a reading glass, and those cheap glasses will have enough power to enable him to find one by going down the counter wich which he can read. Patients occasionally get them even to see at a distance with, if they just happen to be such a case that they will improve their seeing. Those are generally older people who do that, or someone who has lost his glasses suddenly or has broken them and has to see that day.

Q. Yes, sir.

A. I mean the exigencies of the moment might cause

any of us in this court room to go down and get a pair. That's all they do. They are of that type of glass. As far as whether that is harmful or not, in my opinion that does no harm whatever. If the patient wants to wear that kind of glasses, he may wear them without hurting his eyes in any way. They may give him a headache. If he doesn't mind a headache, let him wear them. It doesn't damage him in any way.

Q. Doctor, in your opinion, is it possible to include in your prescription a prescription for fitting, adjusting and adapting eyeglasses to the face?

[fol. 248] A. No, it isn't. I mean, it's conceivable that it could be done, but I'm not trained to do that, and would feel that I was giving a very inferior service. Besides, I don't have the time to take away from serious cases to enter into that type of thing.

Q. Doctor, in your opinion, is it in the interest of the health and welfare of the people of Oklahoma to prohibit the filling of prescriptions for eyeglasses written by ophthalmologists who reside out of the State of Oklahoma?

A. State that again.

Q. Is it in your opinion in the interests of the public health and welfare of the people of Oklahoma to prohibit opticians from filling prescriptions for eyeglasses written by ophthalmologists residing outside the state?

A. It is not in their interests. It is against their interest, and it would make a very awkward situation. Many of our patients, many of our people in Oklahoma, go to out of state oculists, ophthalmologists, many of them, and are given prescriptions. When they get home with their prescription, what would they do with it? It couldn't be filled. They would have to then seek an ophthalmologist within the State of Oklahoma and have the examination done all over again.

Q. Dr. Coston, I will ask you if you are a member of any committee that is working in any way in connection with opticians or opticians' licenses or——?

[fol. 249] A. Well, yes, there is a movement to prepare and try to establish a licensing act for dispensing opticians in Oklahoma.

Q. What is that committee, of what parent body is that a part?

A. Well, the State Medical Society, we are—is going to enter into it, and the various ophthalmologist in my opinion, to help bring this about.

Q. In your opinion, if there are any evils existing in opticianry, can those be corrected by such licensing measures?

A. I would say the major evils could be.

Q. Yes, sir.

A. In my opinion that is the way that should be done.

Mr. Woods: That is all. You may inquire.

Cross Examination.

By Mr. Daugherty:

Q. Dr. Coston, when a patient comes to your office in search of eye care or in need of glasses, do you consider that a professional relationship is created between you and that patient?

A. What is the question?

Q. When a patient comes to your office with defective vision and in search of glasses——

A. Yes.

Q. (Continuing:) —do you consider that the doctor-[fol. 250] patient relationship is created between you and the patient?

A. That it is created?

Q. Yes.

A. Well, the relationship would have to be created.

Q. Do you consider that, of course, a professional and confidential relationship?

A. Yes, sir.

Q. And Doctor, do you consider yourself responsible professionally for the eye care of that patient?

A. Yes.

Q. Should an optician undertake to grind lenses and fit the glasses on the face of a citizen of Oklahoma, unless he has the prescriptive authority to do that from a doctor, either optometrist or ophthalmologist?

A. I don't think it's necessary that he have a prescription.

Q. You mean that an optician could grind a lens and

fit the product to the face without some doctor making an examination?

A. If he has a prior lens to go by.

Q. Take in my case, Doctor. I have no glasses. Before an optician should undertake to grind lenses for me and fit them to my face, should he have a written prescription?

A. Well, he would have to have. Where would he start?

Q. That's what my point is, Doctor, that an optician does need a written prescription before he can grind lenses [fol. 251] and fit them to the face.

Mr. Duvall: Your Honors please, make an objection to that as a dual question, because he speaks of grinding the lenses and fitting them to the face. They are two separate functions.

Judge Murrah: Very well.

Mr. Daugherty: I will rephrase my question.

By Mr. Daugherty:

Q. Doctor, my question is, that an optician is not qualified to make an eye examination?

A. Correct.

Q. And before he would undertake to grind lenses to correct defective vision, he would have to have a prescription from one qualified to make an examination?

A. Or a pair of glasses in his hands he could duplicate.

Q. My question is, he would have to have the prescription, or as you say, a set of glasses in his hands?

A. Yes.

Q. Do you feel that people that do not have glasses but who need to have them and who would get them from an optician, should first have an eye examination by either an optometrist or an ophthalmologist?

A. Now you are speaking of someone who has——

Q. (Interposing) Has no glasses.

A. Yes, that's correct.

[fol. 252] Q. Doctor, I believe you stated that your prescription sometimes contains information about the working distance or the distance those glasses should rest before the eyes?

A. Yes, sir.

Q. Does your prescription sometimes contain information about, say, being off axis or off center?

A. Occasionally.

Q. You have instances of that kind?

A. Rare.

Q. I believe you testified that ill fitting glasses will create no permanent damage to the eye.

A. Yes, sir.

Q. Will ill fitting glasses result in a loss of efficiency to the patient?

A. Why, it could.

Q. Will ill fitting glasses sometimes aggravate whatever condition the patient might have in the way of eye trouble?

A. That is too vague, that is too general.

Q. Would it?

A. It would make them tear more, or get redder, it might, they might; it wouldn't cause any serious anatomical permanent damage to the eye.

Q. Wouldn't there be a loss of efficiency; there would be discomfort, Doctor?

A. Could be.

[fol. 253] Q. What about a condition of nervousness? Would ill fitting glasses tend perhaps in some cases to aggravate a nervous condition?

A. Could be. That would depend on the basic type of individual, but it could do it in some cases.

Q. Doctor, your written prescription is the result of your examination, is it not?

A. Yes, sir.

Q. You write down exactly what you want in the way of lens, that is its grinding?

A. (Nods affirmatively)

Q. Now isn't there an allowable tolerance as to how that lens may come back from the optician?

A. Very slight tolerance.

Q. But there is some tolerance?

A. A little.

Q. Now if that lens should then be duplicated on a lensometer, would that lensometer reading be your prescription, or would it be whatever prescription the grinding resulted in?

A. State that again.

Q. All right, sir. In other words, you make an eye examination, you put down exactly what you want.

A. Yes.

Q. Now if that prescription is filled, there is a tolerance [fol. 254] within which it might be filled?

A. Right.

Q. Which, I take it, means that it doesn't quite comply with your prescription.

A. Yes.

Q. But within an acceptable tolerance?

A. Yes.

Q. Now when that lens is put into that machine to ascertain its strength, and assuming that you have a skilled operator and a properly adjusted machine, will the prescription you get from that machine be the prescription of that lens as ground and not necessarily as you prescribed it by your written prescription?

A. It would be within the limits of tolerance.

Q. Well, it would be whatever the lens was ground at, would it not, Doctor?

A. Yes, as far as the tolerance of the lensometer will let it be that.

Q. Let me give you this case: Assuming that you prescribe one seventy-two and one-half axis, if it came from the optician at one seventy-five, would that be an acceptable tolerance?

A. Only in a small error, not in a large error.

Q. Very well. Now assuming that it came back at one seventy-five and it was in the acceptable tolerance, in your [fol. 255] opinion, and it was undertaken then to duplicate that lens by reading on the lensometer, would that lensometer reading be one seventy-five, assuming that you have a qualified operator and well adjusted machine?

A. Well, it would be so close, it would be inconsequential if it were off any.

Q. All right, then if that lens was duplicated by the optician, would there be another tolerance then allowable on that lens?

A. It would be an allowable tolerance in the hands of a good optician.

Q. Could it be 177.5?

A. You are getting your tolerances a little out of line. I don't see how that applies. You are getting into a specific case.

Q. Doctor, what I am trying to point out is that if a patient's glasses are duplicated time and time again, with this tolerance cumulative, assuming that in some cases it would be all cumulative in the same direction, would that man eventually end up with a pair of glasses that would be considerably off axis, and off axis enough to be ill fitting?

A. It's conceivable, but if you want to speculate, the error might be one way or the other, and if he's fool enough to go twenty-five years buying glasses that way, all right, but it won't do him any harm.

[fol. 256] Q. Well, he might have a pair of ill fitting glasses, though?

A. He might.

Q. They could cause him discomfort?

A. They might.

Q. Nervousness, loss of efficiency?

A. Might.

Q. Beg pardon?

A. Might be.

Q. Are there also cases where an optician should not undertake to duplicate a fragment of a lens?

A. Oh, yes, if he doesn't have enough of a fragment.

Q. If the optician undertook to duplicate that fragment, would the patient probably receive a pair of glasses which would be the result of guess work, perhaps ill fitting?

A. He might.

Q. Could it be possible that the patient would receive a pair of glasses that would be off axis?

A. He might.

Q. Off center?

A. Could be.

Q. Now if on the other hand the person undertaking to do that duplication had a written prescription, would he not get the proper axis and proper center of the glasses?

A. That would be better.

Q. That would be better, would it not, Doctor?

[fol. 257] A. (Nods affirmatively.)

Q. Do you think it would be better to try to duplicate a

pair of glasses from your prescription more accurately than to duplicate it with a pair of glasses the optician grinds pursuant to your prescription?

A. It would be some better, usually.

Q. Do you advocate, Doctor, that people should have rather frequent eye examinations to see if there are any changes in the condition of their eye?

A. Well, I don't advocate any certain time interval. In general we tell them two years, two or three years.

Q. That would be advisable, in your opinion?

A. But that varies from patient to patient.

Q. Doctor, do patients sometimes come into your office in search of glasses, and you find from your examination that they do not need glasses?

A. Yes.

Q. How often does that happen, just in your best judgment?

A. Well, in my own practice it doesn't happen too often, but I would say that is not an uncommon thing.

Judge Vaught: What was the question? I didn't get that.

Mr. Daugherty: The question was whether or not some patients came to him for eye examination and after his examination he found the patient needed no glasses.

[fol. 258] The Witness: It's rather frequent.

By Mr. Daugherty:

Q. As to the frequency, how often does someone come to your office thinking they need glasses but you find from the examination that they do not?

A. It would be rather frequent. I don't have so many cases for refraction, but in general ophthalmologists would find that was fairly frequent.

Q. Of course, you do not fit them with glasses if they don't need them?

A. No.

Q. Is it your opinion that actions to correct defective vision should be done, as far as the examination is concerned, by a professional man?

A. Yes.

Q. Are there any professional people qualified to do that other than ophthalmologists and optometrists in Oklahoma?

A. No.

Q. Do you agree with the provision of this Act that unqualified persons should not be permitted to visually correct for compensation the eyes of another?

A. How was that stated now?

Q. Do you believe that no unqualified person should be permitted to visually correct for compensation the eyes of another?

[fol. 259] A. Yes.

Q. If a person is in need of attention for defective vision, should he go to a doctor for his needs in that connection; by that I mean an ophthalmologist or an optometrist?

A. Yes.

Q. Is that where his search for glasses should start?

A. Yes.

Q. Do you think if a person is in need of glasses that he should go to an unqualified person in order to get glasses?

A. No.

Q. You do consider it a bodily ill, that is defective vision?

A. Well, in what sense?

Q. Well, in a medical sense.

A. It's not a disease.

Q. I know, but it's a bodily defect or bodily ill, in a general way, is it not?

A. In a very general way.

Judge Vaught: Would you say that the health of an individual should be affected by the character of the glasses that he wears?

The Witness: Only, your Honor, someone who might be highly nervous, and that would just be one more little thing to influence their general health; not per se would improper glasses do any damage to an individual.

[fol. 260] By Mr. Daugherty:

Q. But there could be a loss of efficiency, discomfort, and aggravated condition of the patient, nervousness and so forth?

A. Could be.

Q. Doctor, I believe you feel that the people of Oklahoma are entitled to the best possible visual care, are they not?

A. They are.

Q. Isn't public vision a matter of importance to the State of Oklahoma?

A. It is.

Q. If all the glasses of the people of Oklahoma were melted to be destroyed, would there be an effect on industry?

A. Yes.

Q. Efficiency of the country?

A. Do you really think I have to answer that? It's obvious.

Q. Doctor, do you feel that eye examinations should be made professionally by doctors acting in professions?

A. Yes.

Q. Do you feel that eye examinations should be done with commercial control and commercial interests predominating?

A. No.

Judge Vaught: Doctor, do you know of any opticians who pretend to make examinations?

The Witness: No, I don't.

[fol. 261] Mr. Daugherty: That's all, thank you.

Redirect examination.

By Mr. Woods:

Q. Just one question: In your opinion, Doctor, is advertising by opticians detrimental to the health and welfare of the people of Oklahoma?

A. Proper advertising isn't.

Mr. Woods: That's all, thank you, Doctor.

Judge Murrah: I just want to ask one question, which I think perhaps summarizes the crux of this matter: Would you consider it detrimental to the visual welfare of a patient of yours, for whom you had issued a prescription for a refraction of his eyes, to return to a qualified optician to have that prescription refilled for any reason, that is because he lost his glasses or because they were broken; but

they were broken and he had a fragment of the eyeglasses which would enable a qualified optician to refit or to regrind them?

The Witness: It would not be detrimental.

Judge Murrah: Without returning to you?

The Witness: It would not be detrimental.

Judge Murrah: (Continuing) For an additional examination or another prescription; would you expect him to do so, or do you instruct your patients to do so in those instances?

[fol. 262] The Witness: Yes, I instruct them to have the optician to replace the glasses, and then if sufficient time has elapsed that it would be natural to assume the eyes might have changed, to make an appointment and have the reexamination when it can be done.

Judge Murrah: Now in the practice of your profession in the highest order, do you know of any objection or any detriment that would result to the visual care of a patient if he returned to a qualified optician to have his prescription refilled without first coming to you?

The Witness: No, it wouldn't be detrimental.

Judge Murrah: Well, "detrimental"; it would not only not be detrimental, but is that the prescribed practice?

The Witness: Yes.

Judge Murrah: In your profession.

The Witness: Yes, until such time as he can have a reexamination. In other words, it's not so important whether he have that lens replaced without a new examination or not.

Judge Murrah: Well, of course, that is professional care, whether he should need new glasses or not for some pathological condition or because his arm got shorter or something like that.

The Witness: But there is nothing wrong in that practice as you state it.

Judge Murrah: Yes, professionally?

[fol. 263] The Witness: Right.

Judge Murrah: Or that you consider, as a physician, in any way detrimental to the welfare of one of your patients?

The Witness: That's true.

Judge Murrah: Under similar circumstances.

The Witness: Yes, sir.

Judge Murrah: Thank you.

Mr. Daugherty: May I ask one question, if the Court please?

Recross-examination.

By Mr. Daugherty:

Q. But of course, the optician should have the prescription for glasses when he comes back to have them filled, still have your prescription?

A. He should have and he would have it, as the Judge stated the question.

Judge Murrah: Well, he either would have the prescription or the optician would have the prescription. In other words, of course he couldn't regrind the glass without a prescription of some kind. I'm assuming, of course, that he would either have it in his physical possession or it would be available.

The Witness: Or he can take the lens, if he had a sufficient piece of it, and neutralize it and grind it from that. There is nothing wrong with that practice in the hands [fol. 264] of a qualified optician who will not try to grind the lens that he can't tell the strength of.

Judge Murrah: But if I lost my glasses, and I lose them all the time because I don't wear them—if I wanted two pairs of glasses, would you consider that detrimental to my visual care if I took these glasses back to an optician, any optician, either the one who originally dispensed them or to another one——

The Witness: (Interposing) It would not be.

Judge Murrah: (Continuing) ——and ask him to duplicate.

The Witness: It would not be detrimental, and in fact it would be the sensible thing to do. If the other glasses are satisfactory and you want a duplicate pair, why have the extra expense of another examination and all of that, when you are happy with what you have. Have them duplicated. He can read that on the lensometer without a prescription and arrive at the strength accurately, more accurately than you could under a new examination and give your answers subjectively. The lensometer is a very accurate instrument,

within very slight errors, and your glasses could be duplicated absolutely by a good optician within limits of tolerance.

Judge Murrah: Yes. You do not consider those limits of tolerance of sufficient importance to require the patient [fol. 265] to return to you?

The Witness: I do not.

Judge Murrah: To determine whether or not he did get a pair of glasses, a duplicated pair of glasses within those accepted tolerances, is that right?

The Witness: That's correct.

Judge Murrah: Is that an intelligent question?

The Witness: Yes, sir, it is.

Judge Murrah: Then you would not, if I should be so fortunate as to be your patient and you prescribed these glasses for me, and I needed additional glasses, or broke them, lost them sometime within two or three years, you would not expect me to return to you for additional care or examination?

The Witness: Not——

Judge Murrah: (Continuing) Either before or after I had the glasses ground, duplicated.

The Witness: Not for that reason alone, no.

Judge Murrah: Unless there is some other reason.

The Witness: Yes.

Judge Murrah: In that question, I assume, of course, that there is a professional, pathological reason——

The Witness: Yes.

Judge Murrah: (Continuing) ——that is entirely outside of the realm of our inquiry here.

[fol. 266] The Witness: Yes.

Mr. Daugherty: May I ask one question, please, your Honors:

By Mr. Daugherty:

Q. With reference, Doctor, to duplicating a set of the Judge's glasses, are you assuming that you have a skilled operator on the lensometer and a lensometer that is in good adjustment?

A. Yes.

Q. Are you also assuming that the lens of those glasses has not rotated off axis?

A. I don't assume anything about it. If he is satisfied with the glasses, he has them duplicated. If he isn't, he isn't going to have them duplicated. If it's off axis and it's causing him no symptoms, he doesn't know it's off axis, he can have them duplicated and wear them and there is no harm done.

Q. Still that would not be the type of lens you would want to have him to wear, according to your prescription?

A. It would not be according to my prescription, no. What we aim to do in a refraction, I think that sometimes we get mixed up in technical things too much. The aim of a proper refraction is first of all to have the best vision that the glasses will give the patient, plus comfort. Now if the glasses are fitted improperly, and a number of times that [fol. 267] will be true, because the patient subjectively didn't give you the proper answers, or maybe the doctor was a little careless that morning, but if he gets the glasses and he sees well, and he has no discomfort, suppose that a mistake had been made somewhere, it is of no importance. You fit the patient with glasses to make him see the best you can, with comfort. Now technically whether you've got it on this axis or that axis is of absolutely no importance, and you find people wearing the screwiest type of glasses, that when you get through examining them, your reading and your interpretation of what they need is exactly different to what they have worn, but they have been quite comfortable and they have seen well with what they have had.

Now you have two choices. You can let them wear what they have, or you can give them a new pair of glasses, and very often we let them wear what they have had, if financial matters enter into it. You can't say that the eye is like a piston in a cyinder, you don't have to fit it to that tolerance.

Now we are after comfort and the best vision and that's all.

Mr. Daugherty: That's all, thank you.

Judge Murrah: Doctor, you understand the scope of our inquiry here is confined to refraction?

The Witness: Yes, I know, and a lot of my remarks [fol. 268] are based on that assumption.

Mr. Woods: Just one question.

Redirect examination.

By Mr. Woods:

Q. With respect to a lensometer, is it difficult to instruct a person of average intelligence as to how to properly use the lensometer?

A. No, it's a simple instrument to use with an intelligent individual. I have instructed many people in using it. It isn't a difficult instrument, if you have a proper instrument.

Q. And it is a precise optical instrument, isn't it?

A. Oh, yes.

Judge Murrah: You are excused.

(Witness withdraws.)

Judge Murrah: Court will be in recess until 2:00 o'clock.

(Whereupon the noon recess was taken, to reconvene at 2:00 p.m., with the same counsel present.)

[fol. 269] AFTERNOON SESSION

October 26, 1953

Judge Murrah: Proceed.

ALLEN D. HILL, called as a witness on behalf of the plaintiffs, being of lawful age and being first duly sworn, testified as follows:

Direct examination.

By Mr. Woods:

Q. Will you state your name, if you please?

A. Allen D. Hill.

Q. Where do you live, Mr. Hill?

A. 1819 Northwest 31st, Oklahoma City.

Q. What is your occupation, sir?

A. I am a dispensing optician.

Q. For how long have you been a dispensing optician?

A. Off and on for I should say about eighteen or nineteen years.

Q. Would you just very generally relate your experience in the field of ophthalmic optics?

A. I was employed by American Optical Company in 1934 as a dispensing optician. I was trained in that work, and from that point I went through various departments. They train in various phases of the ophthalmological department, which is the sale of and servicing of ophthalmic instruments.

[fol. 270] Q. Would you speak up just a little bit, please, Mr. Hill?

A. Yes. And then I was field representative for about eight years for them. By that I mean I was salesman, ophthalmic salesman for them. I was in their safety division, which is a division which has to do with industrial safety, ocular safety, and at one time I was assistant branch manager for them.

Q. In what territory?

A. In St. Joseph, Missouri.

Judge Murrah: For whom?

The Witness: American Optical Company.

By Mr. Woods:

Q. And were you a representative of American Optical Company in the State of Oklahoma?

A. Yes, sir.

Q. For a number of years?

A. Yes, sir.

Q. In that connection, did you have occasion to travel over the state and deal with ophthalmologists and optometrists and opticians?

A. Yes, I did.

Q. Mr. Hill, are you the holder of any certificate in opticianry?

A. Yes. I am a member of the National Guild of Opticians, and a Master in Ophthalmic Optics.

[fol. 271] Q. Now that Master in Ophthalmic Optics is issued by what organization?

A. The American Board of Opticianry.

Q. And you are also, I believe you said, a member of the Guild?

A. Yes, sir.

Q. Now what do you refer to by that Guild?

A. Well, it's an association of opticians throughout the country; it's a national organization.

Q. What is the correct name of that body?

A. The National——

Q. (Interposing) Is it the Guild of Prescription Opticians?

A. That's right, sir, the title is the National Guild of Prescription Opticians.

Q. From your experience in the field of ophthalmic optics, is it true that the visual care, eye care field, is divided into three main groups?

A. Yes, sir.

Q. The ophthalmologists, the optometrists, and the optician?

A. That's right.

Q. I will ask you to state, if you will, please, sir, for the Court the functions of the optician in that field.

A. Well, I think I can best explain it by giving the definition that the American Board of Opticianry gives of it, [fol. 272] quote, Opticianry is the art and science of optics as applied to the compounding, filling, and adapting of ophthalmic prescriptions, products and accessories. It is a skilled artisan and semi-professional vocation, devoted to serving the public through the optical assistance rendered to the public.

Judge Murrah: Repeat the last part; repeat the last part, just the last sentence, will you?

The Witness: It is a skilled artisan and semi-professional vocation, devoted to serving the public through the optical assistance rendered to the public.

By Mr. Woods:

Q. Now as an optician, as a dispensing optician, what in general are the duties you perform, just very generally?

A. I receive ophthalmic prescriptions from the ophthalmologists, and in very rare instances optometrists; do the technical work which involves measuring the distance between the pupils, commonly known as P. D., aiding in the selection of a frame, and of course in many cases it is a matter of styling with women, and some men are a little bit particular about what type of frame they wear; so actually it's a combination of technical work plus merchandising.

Q. And that is what is understood from your experience in the trade by the term "dispensing optician"?

A. Yes, sir.

[fol. 273] Q. Can you state what the trade understands the term "optical supplier" to mean?

A. Well, that would be an optical wholesaler, like American Optical Company, or Bausch & Lomb; one who would supply me with merchandise.

Q. Yes.

A. Either a manufacturer or a distributor of the manufacturer.

Judge Vaught: What character of merchandise now do you refer to?

The Witness: Well, lenses and frames.

Judge Vaught: Lenses and frames?

The Witness: Yes, sir.

Judge Vaught: The lenses are in the raw state until you fill a prescription?

The Witness: Well, in my particular mode of operation, they are not. They are in a finished form; what we do—that is, they are ground to the prescription, but in single vision lenses, as differentiated from bifocal—in single vision lenses we do our own cutting and edging operations, and putting them in the frame. Where bifocals are concerned, they are sent to us in a completely finished form except that they have not been inserted in the frame.

Judge Vaught: Then you determine which lens to use from the specification of the prescription?

[fol. 274] The Witness: Yes, sir.

By Mr. Woods:

Q. What if any other services, Mr. Hill, does the optical supplier render? You have mentioned that he sells you the

merchandise that you use, the lenses and the frames. In other words, does the optical supplier do any opticianry work?

A. No, not to my knowledge.

Q. Does the optical supplier do any inserting of lenses into frames, and then the selling of those frames to any segment in this total field of eye care?

A. I believe they do in the safety field only.

Q. Now I wish you would very briefly, but cover the different functions. You have mentioned that you take the doctor's prescription and you obtain the lenses which comply with that prescription. When you have gotten those lenses, in what general shape are they?

A. They are approximately 55 millimeters square.

Q. Yes, and you are speaking now of the finished lenses?

A. No, that is a finished lens, but an uncut lens.

Q. That's correct. Now what do you do with that finished but uncut lens in filling the doctor's prescription?

A. In the case of single vision lenses, we use that instrument, the lensometer.

Q. Yes.

[fol. 275] A. And first ascertain that it's according to prescription. Then we determine the optical center, which of course hinges upon pupillary distance.

Q. Yes.

A. And spot that, we spot the axis of the cylinder.

Q. Yes. Now when you say you spot the optical center and you spot the axis of the cylinder, what do you mean by that?

A. We mark, we actually mark; that instrument has a marking device for that purpose.

Q. And you make a mark, you make a mark for that on the lens, the lens shape, the lens form?

A. That's true.

Q. Then what do you do?

A. It's then put in a diamond cutting machine.

Judge Murrah: Who does that?

The Witness: Who does that?

Judge Murrah: Who does that particular operation?

The Witness: We do.

Judge Murrah: You do?

The Witness: Yes, sir. We have templates or patterns, which fit on this cutting machine, and determine the shape which the finished lens will have; also the cutter is calibrated for the various sizes. The lens is put on that cutting machine according to axis, it is lined up according to axis, and optical centers, placed on the cutting machine and [fol. 276] then cut with this diamond cutter. From that point it is taken, that template or pattern is removed from the cutting machine and placed on what we call an edging machine. In other words, after it comes from the cutter, it has rather sharp edges, it is just like a piece of glass that you would have cut for a window. It has a rather sharp edge. So it's then put, the pattern is then put on the edging machine, which is a large revolving grinding abrasive wheel, and from that point it's what we call edged to size. It is also calibrated for, it has calibration for the various sizes. We put it in this grinding machine and it is then finished, if it's a rimless frame, that's all we do to it, except drilling and of course checking it. If it's one that would go into the Judge's frame, like that, it has to have a bevel put on it. We put that on by hand.

By Mr. Woods:

Q. Now Mr. Hill, you mentioned the optical center.

Judge Murrah: May I —

Mr. Woods: Surely.

Judge Murrah: You have the equipment for and you do perform all of those functions that you just now enumerated?

The Witness: Yes, sir.

Judge Murrah: And that you say is partly within the scope of your calling?

[fol. 277] The Witness: Yes, sir.

Judge Murrah: Vocation.

The Witness: Yes, sir.

Judge Murrah: Proceed.

By Mr. Woods:

Q. You mentioned the optical center of the lens, in the uncut len. where approximately is the optical center?

A. Approximately in the center.

Q. You mean the geometric center?

A. The geometric center.

Q. Now I will ask you whether, if in filling these prescriptions it is ever necessary for you to vary the optical center from the geometrical center of the lens that is to be mounted in the frame.

A. Almost invariably.

Q. And what is the reason for that?

A. Because the average pair of glasses, if made precisely to geometrically center on the individual's pupils, would not be cosmetically acceptable or it might be very much too, it probably would be very much too small.

Q. And is the control of where the optical center will be in the finished lens a matter which you normally perform and control as a part of your function?

A. Yes.

Q. All right, now, after you have cut the lens to shape and [fol. 278] edged it, what next do you do?

A. It is then put in a frame.

Q. Yes.

A. Of the customer's choice, which may be, if it's a rimless, of course, a diamond drill is used for drilling holes so that it can be suspended in these, well, like the Judge's over there; if it's a plastic frame, of course it's a matter of putting a bevel on it and then inserting through a heating process in the plastic frame; or, if it's like Judge Vaught's, it's put in that frame merely by unscrewing a screw and then screwing the screw back in. It is then checked, of course, for stress and strain.

Q. Explain that, if you please.

A. We have a polarizing instrument which is so sensitive that if a person will touch his fingernail, push his fingernail against the edge of a lens, it will show on it, show an amount of stress; and of course we have overcome largely the difficulties that people used to have with maybe wearing a lens a day or so and having it crack, and then of course they would come back. Well, it was mounted, put in the frame too tightly. Where it is put in a metal frame or rimless frame, we invariably use this colomscope.

Q. By using that instrument, you can determine at what point there is no stress, undue stress on that lens?

A. That's right, whether it's safe.

[fol. 279] Q. Very well, sir. Now after you have mounted the lens in the frames, what is the next thing you do, Mr. Hill?

A. We of course straighten them, align them, get the lenses so that they are in plane with each other, and in alignment with the bridge; and as a rule we will align the temples, those ear pieces, so that they are parallel, and then of course we check on the lensometer to verify our work.

Q. To verify the work in what respect?

A. According to prescription.

Q. You mean the power of the lens?

A. That's right, the power of the lens, the axis, and the optical centers.

Q. After you have done all that, what do you do with respect to these glasses?

A. Then of course we call the customer.

Q. Yes, and what do you do when the customer comes in?

A. We go through various manipulations of adjusting the nose pieces and panoscoping the lenses, which is angling them properly so that the corneal distance at the top is the same as at the bottom, and adjusting them so that they are comfortable behind the ears. In other words, we make them comfortable, as well as place them properly before the eye.

Q. Yes. Now going back just a moment: How is the frame that you are going to use for a specific customer of yours determined?

[fol. 280] A. Well, that is, of course, a matter of choice with the customer, and of course they will take our advice if they have some peculiar situation that would not allow them to wear the type of frame they would want.

Q. In the conduct of your business, do you maintain a stock of frames?

A. Yes.

Q. Do those frames come in standard sizes and have sizes, we will say?

A. Yes, they do.

Q. And I suppose in different colors and different shapes?

A. That's correct.

Q. And when a patient comes in with the prescription to be filled, do you display those frames to that person?

A. That's true.

Q. And then within the limits you have defined, permit them to choose the frame they desire?

A. Yes, sir.

Q. That's the way the frame is selected?

A. That's right.

Q. Now what tools do you use in carrying out your business?

A. Well, may I show?

Q. Do you have some here you can show, just tell them, please.

A. Yes, sir. Of course, there are a lot more tools than these, but I won't burden the Court with them. This is [fol. 281] probably the most commonly used tool, which is a very simple pair of fine-nosed, snipe nosed pliers, as they are called, and this is a highly specialized plier which grasps the top of a rimless mounting, and this is one for lowering or raising the nose pads on the type of frame that has nose pads. This is for the alignment of the top bar of the so-called Numont mounting. This is an instrument we use where a person has a very high correction, say that he's had a cataract operation, and his crystal lens has been removed. The doctor, as Dr. Coston explained this morning, will write on his prescription the distance at which his instrument was set from the patient's cornea. Then we will use this instrument to determine how far the frame, or the finished lenses, or sample lenses, will set from the patient's eyes, and with those two figures the laboratory can grind compensations in the lenses which will give the person, give the patient the best possible vision.

Here is what is known as a lens measure, which is for determining the base curvature of a lens. Invariably when we duplicate a lens, we will use this to determine how the lens has been ground, on what curvature it's been ground, because were we to change, even though we might give a person the same power precisely that he had been wearing—if we changed the curvature of the lens, we might cause him, well, just wouldn't be a finished job in our opinion. We are that careful.

[fol. 282] Q. Would you show how you use that lens-meter on that lens?

A. Yes. Shall I go up there? This is just a little clock dial.

Judge Murrah: You will have to speak so the court reporter can hear you, because this must go in the record. It wouldn't be of any benefit.

The Witness: Yes, sure. Well, this lens happens to be a spherical, because the little clock doesn't, little hand doesn't vary, as I turn it around the different meridians of the lens, so this shows a plus 6 front, and that is a minus 6 inside, which means that there is no power in that lens whatever, because when you add plus 6 to minus 6, you get nothing algebraically, and that is the basis on which, of course, all lenses are ground, there is a combination of curvatures. Had that been a plus, we'll say a plus 7 on the outside and a minus 6 on the inside, it would have been a lens of plus 1 power. Anyhow, this is really more an instrument that we use for refining our work.

Judge Murrah: Testing?

The Witness: Yes, but more a refinement, because it's really not cogent to the power, particularly. Back in the old days, lots of people neutralized lenses this way. I can remember when this was used in place of the lensometer back in the old days, but now it's really just an adjunct to the refinement of duplication of lenses.

[fol. 283] By Mr. Woods:

Q. Now Mr. Hill, what tools do you use for determining the pupillary distance, that distance between the pupils?

A. Well, this is just a millimeter rule, which goes up to 15 centimeters, that is 150 millimeters, and that is the one ordinarily used, unless the individual has some peculiarity. Assume that one eye is set farther from the nose than the other. Then we use this type of thing (indicating); we place this on the patient's face.

Q. What is this called?

A. Pupilometer.

Q. Yes.

A. And we can, assuming that one eye is farther from the nose, we'll say the right side, we will decenter that farther

than we will this one. In other words, we will put the optical center according to what we find on this pupilometer.

Q. Is it correct to say then in determining the pupillary distance, the interpupillary distance, it's a matter of measurement, linear measurement?

A. Entirely.

Q. Now the lensometer has been mentioned during the evidence so far. Would you point out to the Court a lensometer?

A. Right here. (Indicating.)

[fol. 284] Q. Now for what is a lensometer used?

A. Lensometer is used for the determination of the power of an ophthalmic lens. When I say ophthalmic lens, of course I mean a lens which is worn in a pair of glasses. It will determine the spherical power, the cylindrical power, the axis at which the cylinder power exists, and also the optical center, as well as any prism which might be contained in the lens.

Q. Now just very generally would you describe to the Court how you determine by viewing this instrument what you see when you have determined the spherical power, you have reached the point where you have neutralized the lens?

A. Where there is a sphere involved, spherical lens, which is a prescription which contains no astigmatism at all, this instrument will show three lines in one direction, and one line at right angles to that, all of precisely the same intensity. This target, of course, is illuminated, a little light back here which I believe that's strip gold, that is the way that target is made, it's stripping off gold leaf, but in a cylindrical correction, this—it's a little bit difficult to explain to someone not familiar with it; but say that I have a plus 2 plus 50 at axis 90. That would be a rather common prescription.

Q. Now that would be a spherical lens?

A. No, that would be a cylindrical.

[fol. 285] Q. Cylindrical?

A. That's right, that's what's called a compound. When I would look into here I would see on this dial, I would see 90.

Q. Axis dial?

A. That's right, this is the axis dial. This is the power dial, and were I to neutralize this, I would first see on this calibration, in the plus area of the wheel, I would see a plus 50, and then I would go up to a plus two fifty.

Judge Murrah: Why?

The Witness: Well, because the difference between that would give you, would be the total power, and the difference between the spherical and the total power is the cylindrical power.

Judge Vaught: In other words, this instrument is for the purpose of determining the character of the lens that you use for any particular purpose?

The Witness: Yes, sir.

By Mr. Woods:

Q. In the instance there: You have Mr. Duvall's glasses. What do you determine the power of that left lens to be?

A. Plus 1.50.

Judge Vaught: All lawyers don't wear the same kind of glasses, do they?

The Witness: No, sir.

[fol. 286] Judge Wallace: Is the right one the same?

The Witness: No, it's a compound. It's different. It's a plus 1.50 plus 25 at axis 50.

By Mr. Woods:

Q. That means that is a combination of a spherical and a cylindrical lens there, cylindrical lens having an axis of 50 degrees?

A. Right.

Q. Is what you have done with respect to Mr. Duvall's glasses what is done by an optician when he checks the lens that is mounted in the glasses to see that it conforms to the prescription?

A. That is correct, except that you do spot the optical centers.

Q. Yes, sir.

A. To be sure that they are according to prescription.

Q. And what you have gone through with the lensometer

are precisely the same acts you would go through if you were duplicating a lens, either to make an extra pair of glasses or where you had a broken lens?

A. That's correct.

Q. Mr. Hill, have you in your experience taught people who purchased lensometers how to use them?

A. Many times.

Q. And whom, in general category, have you taught to [fol. 287] use lensometers?

A. Ophthalmologists, optometrists, opticians, and a number of fellows who were in the Army.

Q. In your opinion, from your instruction, is it a difficult instrument of which to teach the use?

A. Not at all. It's very simple.

Q. Would a person of average intelligence, how quickly do you think you could teach them to use a lensometer properly?

A. I should say in two to three hours.

Q. Of course, I suppose with continued use, a person becomes more proficient?

A. That's correct.

Judge Vaught: What do you do, Mr. Hill, when someone comes to your place of business and teils you that he has broken a lens?

The Witness: Well, of course, if he has bought his glasses from us, we merely go to our record, and if he wants us to, we make him a new lens; or if it's someone who is out of town, say from California, driving through to the East Coast, if there is enough of the lens so that we can determine the shape, where the axis is, and the center should be, we will duplicate it.

By Mr. Woods:

Q. And what will you use to determine the axis and the shape and the power of the lens in that duplication?

[fol. 288] A. Lensometer.

Q. And is that what is used by optometrists as well as the optician in that duplication?

A. Surely.

Q. The same instrument?

A. Surely.

Q. Now you were speaking of the size of the fragment——

Judge Vaught: (Interposing) Suppose that there is not enough of the glass left, the lens left so that you can tell. Then what do you do?

The Witness: Well, we just suggest that they get their eyes examined some place. It's all that we can do.

Judge Vaught: In other words, you never make a completed job except you have the prescription?

The Witness: Well, yes, sir, if we have enough of the lens to duplicate.

Judge Vaught: Aside from that you have to have the prescription?

The Witness: Aside from that you would have to have the prescription? I don't quite follow.

Judge Vaught: Well, before you make up a set of glasses you have to have a prescription?

The Witness: Oh, yes, sir.

Judge Vaught: You wouldn't turn out a pair of glasses, except they were made by filling a prescription?

[fol. 289] The Witness: Never would, except in the case of a duplication, of course, and we might consider that a prescription in a way.

Judge Vaught: In a duplication you would, if you have the prescription, if you made the glasses originally, you would have the prescription on file?

The Witness: Yes, sir.

Judge Vaught: And if there was enough of the glass left and you didn't have the prescription, then you would make it from the glass?

The Witness: Yes, sir; or one other thing we might do: If it were a local doctor and we didn't have a file on the particular customer, we might call the doctor and get the original from him; wouldn't be necessary but we might do that.

By Mr. Woods:

Q. Do you have with you, Mr. Hill, any sample of the type prescription you receive?

A. Yes.
Q. May I see those, if you please?
A. Surely.

(Plaintiffs' Exhibit 18, being prescription, Mrs. Warren Towe, 1/10/52, was marked for identification;

(Plaintiffs' Exhibit 19, being prescription, L. J. Martin, Wichita, Kansas, was marked for identification;

(Plaintiffs' Exhibit 20, being prescription, Lloyd J. Martin, Sept. 12, 1951, was marked for identification.)

[fol. 290] By Mr. Woods:

Q. Mr. Hill, I hand you first what has been marked as Plaintiffs' Number 18 for identification, and ask you to state what that is.
A. Well, it's an ophthalmic prescription for a pair of glasses.
Q. For whom is that made, incidentally?
A. Mrs. Warren Towe.
Q. Who is he?
A. "She", you mean?
Q. Who is she?
A. Mrs. Warren Towe.
Q. Yes. I notice that they have both pencil and pen and ink figures in writing on that. Whose is the pen and ink writing, if you can tell?
A. That's the prescribing doctor's writing.
Q. And what appears on there in pencil is whose writing?
A. That is the dispenser's writing.
Q. I show you what's been marked Plaintiffs' Exhibit 20 for identification; is that also the prescription of an ophthalmologist?
A. Yes.
Q. And is the pen and ink on there the doctor's writing?
A. Yes, sir, there is the transcript. It was so small we had to transcribe our directions on this. (Indicating)
[fol. 291] Q. You are directing my attention to Plaintiffs' Exhibit 19?
A. Yes.

Q. That is what—your record that you prepared in your shop of this prescription?

A. Yes.

Q. That's all in the handwriting of someone in your place of business?

A. That's right.

Q. And that goes along with Exhibit 20?

A. Yes.

Mr. Woods: Plaintiffs offer in evidence Exhibits 19—18, 19, and 20.

(There being no objection, Plaintiffs' Exhibits 18, 19, and 20 were received in evidence.)

By Mr. Woods:

Q. Do you have Mr. Duvall's prescription with you?

A. I did have it. I don't know what happened to it. No, here it is.

(Plaintiffs' Exhibit 21, being prescription, Mr. Duke Duvall, 8/18/51, was marked for identification.)

Q. I hand you what is marked Plaintiffs' Exhibit 21 and ask you whether or not that is Mr. Duvall's prescription for eyeglasses.

A. That's correct.

Q. Issued by whom?

[fol. 292] A. Dr. Coston.

Q. What is the date on it?

A. 8/18/51.

Mr. Woods: Plaintiffs offer in evidence Exhibit 21.

Judge Murrah: Any objection? Let it be admitted.

(Plaintiffs' Exhibit 21 was received in evidence.)

By Mr. Woods:

Q. Now Mr. Hill, I would ask you to very quickly demonstrate, if you will, what is involved in fitting and adjusting frames to the face.

A. May I use——

Q. (Interposing) Use Mr. Phillips.

A. Use Mr. Phillips as the subject?

A. Yes.

A. This is just an ordinary pair of rimless glasses.

Q. You have placed the glasses on Mr. Phillips' nose and the ear pieces over his ears?

A. That's right. It happens that sample is a little bit small for him. I find a little difference here, too, in the way, in the angle of the right side of his nose, as compared to the angle of this particular pad, so I will straighten that out, make it flat against his nose, so that the edge won't bear down too heavily.

Q. Now in making that adjustment, you are using what instrument, Mr. Hill?

[fol. 293] A. Just an ordinary pair of snipe nose pliers.

Q. Pliers, and you are bending the wire support to that pad?

A. That's correct.

Q. Now as a result of that testing of the glasses on Mr. Phillips' face, what do you find?

A. That they were setting a little bit too low, they were resting on his cheek, a little too much on his nose.

Q. You mean the bottom part of the lens was resting on his cheek?

A. Nasal edge of the lenses, so I'm going to raise them.

Q. And how are you raising those lenses, by what adjustment?

A. By bringing the pads together very little.

Q. Yes.

A. That has the effect of raising it on the face, and in some cases, of course, instead of bringing them together, the guard is lowered, or the pad is lowered, so that also will raise the glasses. They are also binding in here (indicating). Therefore I am going to widen these temples or ear pieces.

Q. You pointed to Mr. Phillips' right temple and to the temple piece of the eyeglass?

A. Both sides of his head. In other words, his head is a little bit too wide for the glasses at the moment.

Q. And how do you accomplish that adjustment?

[fol. 294] A. By the simple process of bending these pieces out.

Q. The temple pieces you are referring to?

A. Temple pieces out, and molding a slight curve in there.

Q. With your fingers?

A. Yes.

Mr. Daugherty: May it please the Court, the Court may find this testimony of interest, may want to hear some of this or see some of this. We feel that it is not pertinent to the issues in this lawsuit, because there isn't any question that the dispensing optician can dispense, and can fit and adjust glasses if he has the prescription for them; and I don't wish to object to it if the Court is interested in seeing this, but I do wish to point out that in our opinion it is not material to the issues of this lawsuit.

Judge Murrah: The Court understands that from the pretrial conference, that the function of an optician is that of a craftsman and it involves the skill of a craftsman. Now it would seem that would be sufficient, that that would serve the purposes of this lawsuit. Of course if you have something else in mind, why the Court would be glad to hear you. This is interesting, and the Court has no disposition to curtail your proof, but we don't understand that there is any, the Court doesn't understand that there is any dispute concerning the function of an optician, as distinguished from that of an optometrist or an ophthalmologist.

[fol. 295] Mr. Woods: Well, your Honor please, it is my understanding that the State and these defendants are contending that just what Mr. Hill was doing constitutes the practice of optometry.

Judge Murrah: The Court doesn't so understand, but it may be, and if that is true it might be that it's pertinent, I suppose, and material to show that what is claimed to be the work, the practice of a profession, is nothing more than the application of the skill of a craftsman.

Mr. Woods: That is the reason we are offering it, your Honor please.

Judge Murrah: I don't know what the State's position is about that. I understood that that was made, I don't know whether it was agreed upon, but discussed in any event.

Mr. Daugherty: That may or may not be the practice of optometry, but the dispensing optician is permitted to do it under this law, provided he has a prescriptive authority to proceed with the patient.

Judge Murrah: That's true.

Mr. Woods: If your Honors please, I am basing it partly upon the answer of the defendant, particularly paragraphs 5 and paragraph 8; and paragraph 8 is in answer to our paragraph 11 in our complaint, in which we allege that the plaintiff is doing these things that have been demonstrated by Mr. Hill, among others, and the defendants have [fol. 296] answered and said that not only is that a violation of House Bill Number 953, but also violative of the provisions of Chapter 11 and Chapter 13 of Title 59 of Oklahoma Statutes, those two being, 11 being the optometry statute and 13 being the medical practitioner statute; so they have alleged in their answer that the doing of these things constitute the practice of optometry, or the practice of medicine, as I understand it, and that is the purpose for which I am offering this line of evidence.

Judge Murrah: Proceed.

The Witness: I think he is about finished. One more thing I am going to do is to angle or panoscope the lenses properly so that the top of the lens and the bottom of the lens will be equidistant from the pupil when the glasses are put on the face.

By Mr. Woods:

Q. And you use for that adjustment what tool?

A. It's another pair of, specialized pair of pliers called the Numont plier.

Q. Yes. You have completed the adjustment of those glasses?

A. Yes.

Q. Thank you, sir. Will you resume the stand, if you please.

Judge Vaught: How long has just what you have been doing been done by opticians?

[fol. 297] The Witness: Well, I imagine probably since the first pair of glasses were invented or discovered. I believe since the 14th Century, as I understand my history.

By Mr. Woods:

Q. Have opticians been doing these acts as long as you have been, for the twenty years you have been in the field?

A. Oh, positively.

Mr. Woods: I don't mean to interrupt. Did your Honor have another question?

By Mr. Woods:

Q. Mr. Hill, in connection with your work in this field, I believe you testified that you have had occasion to travel over the state and to deal with optometrists and ophthalmologists and opticians?

A. (Nods affirmatively.)

Q. Based upon that experience, do you have any knowledge as to how optometrists practice in the State of Oklahoma with respect to their prescriptions, and particularly do the optometrists in Oklahoma permit a person whose eyes they have refracted to take the prescription out and have it filled by an optician of that patient's own choosing, to your knowledge?

A. To my knowledge, I would say they do not.

Q. In the time that you have practiced as a dispensing optician, how many optometrists' prescriptions do you recall that you have filled?

[fol. 298] A. In the three years that I have, three and one-half years I have been in Oklahoma as a dispensing optician, I would say not more than three.

Q. Is it true then that the rest of the prescriptions you have filled come from ophthalmologists?

A. That's right.

Q. Do you have a knowledge as to how optometrists in this state charge for their examination and for their glasses?

A. I would say that generally speaking a pair of glasses comparable to those that I just adjusted would probably cost the individual about $30.00.

Q. What kind of glasses are those?

A. Single vision lenses and a Numont mounting.

Q. Is it the practice of optometrists in the State of Oklahoma to your knowledge to make just one charge?

A. Yes, it is.

Q. Which covers the examination and the glasses?

A. (Nods affirmatively.)

Judge Murrah: The $30.00 is the charge, an ordinary charge made by an optometrist?

The Witness: Yes, sir.

Judge Murrah: Thank you.

By Mr. Woods:

Q. Can you tell me what the average optometrist in this community would charge where he made a refraction but [fol. 299] did not prescribe glasses?

A. I would imagine about $5.00.

Q. Can you tell me approximately the cost of the materials in these glasses, that is a Namont frame and a single vision lenses?

A. I should say about $7.50, $8.00.

Q. Do opticians here to your knowledge make any charge for adjustment of glasses?

A. No.

Q. Do you adjust glasses for persons even though they may not be customers of yours whenever they come in?

A. Yes, we do.

Q. And you make no charge for that?

A. That is correct.

Q. Can you tell me approximately what percentage of the optometrists here in Oklahoma City are located in ground floor locations?

A. I would say——

Mr. Daugherty: (Interposing) I object to that, incompetent, irrelevant and immaterial, has no bearing on the issues in this case.

Judge Murrah: Overruled.

By Mr. Woods:

Q. Did you answer that, Mr. Hill?

A. I would say over half of them.

[fol. 300] Q. And in what type of locations are their ground floor offices?

A. Downtown, central business area locations, choice locations from a commercial standpoint, I'd say.

Q. How about out in the suburban retail shopping areas, are there any optometrists out there in those areas?

A. Yes, some have gone out there.

Mr. Woods: That's all. You may inquire.

Cross-examination.

By Mr. Daugherty:

Q. Mr. Hill, how long have you been a dispensing optician on your own?

A. You mean how long have I owned my own business?

Q. Yes.

A. Since the first day of 1950.

Q. Since the year of 1950?

A. Yes, sir, since the first day.

Q. Prior to that were you with the American Optical Company?

A. Yes, sir.

Q. Was your primary function with American Optical Company then that of a salesman?

A. In the latter years, yes, sir, the past——

Q. Go ahead. I'm sorry, I thought you had finished.

A. In the, I would say the past seven years, yes.

Q. Were you ever in their optical grinding department? [fol. 301] A. No.

Q. Do you know how to grind lenses?

A. No.

Q. Do you grind your own lenses in your place of business?

A. No.

Q. Do you have a lensometer in your place of business?

A. Yes, sir.

Q. How did you happen to become a dispensing optician?

A. Back during the depression, American Optical Company was in need of trainees as dispensing opticians, and I went to work for them as a trainee and they trained me in that function.

Q. Now if you receive a prescription for glasses from an ophthalmologist or optometrist, do you send that prescrip-

tion on to a supply house, do they do the grinding of the lens?

A. Yes.

Q. Do you send the same prescription or do you prepare one of your own?

A. No, we usually telephone our orders.

Q. You retain the original prescription?

A. Yes.

Q. Then do they send back the lens that have been ground according to the prescription?

A. That's correct, with a copy of the prescription.

Q. Now I believe you testified that if somebody comes in [fol. 302] with a pair of glasses and wants them duplicated, that if you have the prescription that you will duplicate from the prescription; is that right?

A. That's true.

Q. Do you prefer to duplicate from the prescription over and above duplicating from the glasses themselves?

A. Not necessarily. The only reason we do, it saves time.

Judge Murrah: Will you repeat that question, please?

By Mr. Daugherty:

Q. Will he prefer to duplicate from the medical prescription rather than to duplicate from the glasses themselves.

Judge Murrah: What is the answer?

The Witness: We do for the simple reason that it saves the time of neutralization.

Judge Murrah: You do what?

The Witness: We refer to the original, and we like to keep all of the material in one file, as the girl will always go to the file and pull out the original prescription of the customer so that we won't have several different files on one individual. That's the only reason we do it.

Judge Murrah: Very well.

By Mr. Daugherty:

Q. Isn't it true that the doctor's prescription puts down exactly how he wants the lenses ground and where he wants [fol. 303] the optical center and where he wants the axis to be?

A. No, very rarely the optical center; he specifies the power.

Q. It will give the optical center, will it?

A. No.

Q. You do have the optical center in a new prescription, do you not?

A. Well, certainly.

Q. My point is that the doctor's prescription does give you the strength of the lens, he gives you that exactly, is that right?

A. That's right.

Q. He gives information about the optical center and perhaps the axis?

A. Uh huh, occasionally about the optical center.

Q. That's in accordance with his examination, is that right?

A. Yes.

Q. Does the grinding laboratory attempt to follow that prescription exactly?

A. Certainly. If they don't, they get them back.

Q. Is there some acceptable tolerance, though, from the exact medical prescription that is permissible?

A. Very little; very little.

Q. All right. Now if the pair of glasses have been ground according to the prescription, and there is a tolerance [fol. 304] therein that they do not exactly comply with the doctor's prescription, and you then attempt to duplicate those glasses by the glasses themselves on the lensometer, isn't it correct that you do not get the doctor's prescription by the lensometer, but rather you get the prescription as to how the grinder of the lenses finished that product from the doctor's prescription?

A. Well, that would be true, yes.

Q. Now Mr. Hill, an unskilled person cannot operate this machine, could they?

A. Well, with a little training, I should say so.

Q. Could I determine the strength of my glasses from having merely used one of these, looked in one of them?

A. No, not immediately, but you could.

Q. Do operators of this machine get rusty from time to time if they lay off?

A. I shouldn't think so.

Q. Do optical laboratories sometimes have two of these machines, two operators who check each other when they do that work in the supply house?

A. That I wouldn't know.

Q. Well, you were with American Optical, didn't they do that?

A. Well, one machine is ordinarily used for laying out the lens.

[fol. 305] Q. Don't they frequently use two machines, two operators, to try to get accuracy in the supply houses?

A. Well, I wouldn't say so.

Q. Your testimony is that they don't in American Optical?

A. No, I don't think so. Just like I told you, in laying out the lens, the lens would be neutralized by the lensometer. It would be spotted for optical center and axis, and if there were anything wrong with it at that time it should be caught. Then, of course, after the lens is completely fabricated, it would also be checked so that there would be two checks on it.

Q. Is there some element of human manipulation in this machine in order to read it properly?

A. Very little.

Q. But there is some human element in it?

A. Well, I would say very little.

Q. But there is some; what about the machine, does it get out of adjustment occasionally?

A. Very, very rarely. I can't remember any instance in all of my experience where one got out, unless perhaps the bearings wore on it or something of that type, something mechanically wrong with it.

Q. Isn't it frequently the case that some of the practitioners buy one of these machines every couple of years?

A. They could, but I see no reason for it.

[fol. 306] Q. Don't they do it, some of them?

A. I wouldn't know.

Q. In other words, can this machine wear out, isn't it subject to maladjustment?

A. I would say very little.

Q. Now if I have a pair of glasses and the lens is rotated in my glasses away from the prescription that the doctor wanted me to have, and you put my glasses in this lens-

ometer, would you get the correct axis or would you get the axis to which my glasses have rotated?

A. Say that again.

Q. If the glasses in my frame have rotated off axis, say ten or fifteen degrees from that prescribed by the doctor and you attempt to duplicate the glasses with the lensometer, will not your axis reading be the rotated reading and not that prescribed by the doctor?

A. Well, that's correct. In other words, the patient would wear the same thing after he went out that he came in with.

Q. Yes, sir, but that may not be the doctor's prescription, might it?

A. Well, no.

Q. If you had the doctor's prescription and you followed his prescription duplicating, would you not from the supply house then get glasses in accordance with the doctor's pre- [fol. 307] scription, or with an acceptable tolerance?

A. (Nods affirmatively.)

Judge Murrah: What was the answer?

The Witness: Yes.

By Mr. Daugherty:

Q. Now if I should have these glasses duplicated two or three times with an acceptable tolerance each time, and the grinding laboratory went to the extreme of the acceptable tolerance in the same direction, might I end up with a pair of glasses that might be as many as ten or fifteen degrees off axis?

A. That's possible, but I think we'd hear from the person whose lenses we duplicated.

Judge Vaught: How is that material? Wouldn't that be true if it was by an optometrist or an ophthalmologist or anybody else?

Mr. Daugherty: Yes, it would, your Honor. My point, sir, is this: That if they duplicate from the doctor's prescription they duplicate from his exact examination findings, whereas if they duplicate from the glasses, the glasses can have changed condition, the axis can have moved, or something of that kind, to where they, when they duplicate they are not following——

Judge Vaught: (Interposing) You are assuming that if they duplicated the glasses from the glasses, that it wouldn't [fol. 308] be a duplicate?

Mr. Daugherty: It wouldn't be a duplicate of the doctor's prescription.

Judge Vaught: It would be exactly like the first set, wouldn't it?

Mr. Daugherty: No, sir, because if the glasses changed from a prescription, then they duplicated the glasses, it would not be the prescription.

Judge Vaught: You are assuming that the glasses didn't follow the prescription?

Mr. Daugherty: Either that or a case where the lens may rotate in the frame, your Honor, to where it would be off axis several degrees, and duplicated would be duplicated off axis, whereas if the duplication was made from the doctor's prescription, they would go back to the original proper axis which he wanted the glasses to be furnished the patient. My point is that in some instances the patient by a duplication from glasses will not receive the best possible visual care, but instead will receive glasses that do not comply with the doctor's prescription, whereas if these suppliers were required to follow the doctor's prescription, they would get what he ordered.

By Mr. Daugherty:

Q. Now I believe you testified a few moments ago about Mr. Duvall's glasses here; on the right eye, I believe, you [fol. 309] gave him plus 1.50 and plus 25 with axis of 50.

A. I believe so.

Q. How does it happen that Plaintiffs' Exhibit 21, which is the doctor's prescription, shows the axis of 45?

A. Well, they must have got it out five degrees off.

Q. Either that or you missed it five degrees in your reading?

A. One or the other.

Q. Then if you prescribed—duplicated a set of glasses for Mr. Duvall, your supply house on your prescription, instead of getting glasses Dr. Coston ordered for him, 45 degree axis, you would furnish him glasses with a 50 degree axis?

A. Well, I imagine that was within Dr. Coston's tolerance.

Q. Well, do you know that to be a fact?

A. Well, I imagine Mr. Duvall took them out there.

Q. The point is you missed his axis five degrees, didn't you, according to the prescription?

A. It's possible.

Q. Could you have missed it ten degrees just as well?

A. No, I'm sure we can't.

Q. If you sent this prescription to the supply house, the supply house would have determined it to be a 45 degree axis, would it not?

A. They should have.

[fol. 310] Q. And that's what Dr. Coston wanted, whereas on your prescription it would have gone to the supply house with the axis 50, is that right?

Judge Vaught: Did I understand that the prescription didn't go to the supply house?

The Witness: I doubt if it did. I imagine the secretary in our own laboratory—however, that's only a 25 cylinder, which the tolerance on that I think is admitted to be about ten degrees.

Judge Murrah: Proceed.

By Mr. Daugherty:

Q. Now isn't it true that some prescriptions from ophthalmologists in post-cataract cases or some cases of that kind might give you the distance that he wants the glasses to rest in front of the eyes?

A. Yes, sir.

Q. Might they give you an angle in and an angle out that they want?

A. Very rarely that. I can't recall . angle in or angle out.

Q. Sometimes they do that, do they not?

A. No, they might specify a corneal distance at which the refraction is done.

Q. Now if I had a pair of glasses and the doctor prescribed that they should rest at a precise distance in front [fol. 311] of my eyes, and I ask you to duplicate those glasses, and then you would fit those glasses back on my

face, would you know the exact distance they should rest before my eyes?

A. No.

Q. Now I believe you have already testified about the fragments.

A. Fragments?

Q. Fragments, yes, sir. If I should bring in to you a broken lens without the frame, could you tell the axis of that lens?

A. If we knew the contour of the lens, surely.

Q. If you didn't have enough to where you could tell that contour, would you know the correct axis?

A. No, we would not.

Q. Would you know the correct optical center?

A. No.

Q. If you undertook to duplicate that lens for me without a prescription, might I end up with ill fitting glasses, or glasses at best the result of a guess?

A. Certainly.

Judge Vaught: Would you attempt to reproduce a lens with that information?

The Witness: Certainly not.

Mr. Daugherty: That's all, thank you.

[fol. 312] Redirect examination.

By Mr. Woods:

Q. Just one or two questions: First, Mr. Daugherty asked you something about the optical center of a lens, and I gathered from his question that he was asking you if that was included in the doctor's prescription. Now is or is not the optical center written in the doctor's prescription?

A. Well, no, of course not, it isn't. That would indicate the pupillary distance. The optical center is contained in the finished lens.

Q. Yes.

A. Of course.

Q. And you correlate your measurement of the pupillary distance and that optical center in performing your function, is that not true?

A. That is true.

Q. Mr. Daugherty also gave you a question about a lens having rotated in the frame so that the axis, where the cylinder might be a little bit off; have you ever encountered any such case in your practice?

A. Yes, we have.

Q. How can it rotate in the frame?

A. Very, very rarely in a modern frame.

Q. Yes.

A. Back in the old days when lenses were round, of course [fol. 313] there was lots of danger of that. Where the lenses are angular there is very, very little likelihood of their rotating.

Q. Yes, sir. Now the prescription ground in the lens itself cannot change from day to day, can it?

A. No.

Q. And if a man came in to you with a pair of glasses and asked you to duplicate them, and they weren't causing any discomfort, the glasses you would duplicate, providing they complied with what he had, would give him just the same service he had before, would they not?

A. Yes, sir.

Mr. Daugherty: Object to the question as being leading and suggestive.

Judge Murrah: Yes, it is.

By Mr. Woods:

Q. Mr. Hill, in the prescription you receive from doctors, is there any data regarding the fitting, adjusting and adapting to the face of lenses?

A. No.

Judge Murrah: Beg pardon, repeat that.

Mr. Woods: Yes, sir, you Honor.

By Mr. Woods:

Q. In the prescriptions that you receive from doctors, ophthalmologists, is there any data or instruction to you as [fol. 314] to fitting, adjusting, adapting the frames to the face of the person?

A. There is not.

Q. In your practice, that is left up to you by your ophthalmologist?

A. That is correct.

Q. To your knowledge is it practicable or can such instructions be reduced to writing?

A. No, they could not be.

Q. Can you tell the Court, based upon your experience, approximately what percentage of glasses in the State of Oklahoma are dispensed by optometrists?

A. I would say about——

Mr. Daugherty: (Interposing) I object to the question unless the witness gives us some background on which he can——

Judge Vaught: (Interposing) If he knows he can answer.

The Witness: Well, I have read figures, surveys—about 70%, I would say.

Mr. Daugherty: Object to that, being hearsay evidence, if he doesn't know.

Judge Vaught: Overruled.

Judge Murrah: Be admitted.

The Witness: I read it in an optometric publication.

[fol. 315] Judge Murrah: Do you wish to cross examine him on the point, wish to cross examine the witness on that point?

Mr. Daugherty: No, sir.

Judge Murrah: Mr. Witness, assuming that the legal effect to the law now challenged is to prohibit you from fitting, ...justing, or adapting or replacing eyeglasses, except on the authority of and under prescription of a licensed physician or optometrist, what effect, what impact, what effect will that have on your business; what will it and what way will it affect your business? That's what the Court is interested in.

The Witness: It would be highly detrimental, inasmuch as it would make it——

Judge Murrah: (Interposing) No, don't just discuss it as detrimental.

The Witness: It would make it so very inconvenient for the public to go through all of this rigamarole of getting a prescription that the chances are that the people would be shunted into other optical——

Judge Murrah: Well, no, I want you to tell us what it will prevent you from doing that you are now doing. In

other words, assuming that the law has the effect that I have just enumerated, in what way will that change your, affect your business?

[fol. 316] The Witness: Well, of course, the great majority of the glasses are fitted by optometrists.

Judge Murrah: Yes.

The Witness: And of course, we are on a ground floor location, where it's very handy for the public, and we get a lot of business from people who see our place of business, naturally. In other words, if we were not able to duplicate lenses, for instance——

Judge Murrah: (Interposing) Now that's what I want to know, if one thing—you say it would prevent you, prohibit you from duplicating lenses?

The Witness: Not only would it keep us from selling a lens but also the frame, which is of course a good part of our business. We have only two things to sell, lenses and frames.

Judge Murrah: Then in what other way, specifically, if you can just tell us what way your business would be affected. I believe you stated a moment ago and also Dr. Coston, that you are now engaged in filling prescriptions of ophthalmologists, ophthal——

The Witness: Ophthalmic.

Judge Murrah: Ophthalmic prescriptions.

The Witness: Yes, sir.

Judge Murrah: And that in filling those you do so on the authority of prescriptive authority only?

[fol. 317] The Witness: Yes, sir.

Judge Murrah: You don't profess to do anything else?

The Witness: We don't want to do anything else.

Judge Murrah: Don't want to do anything else. Now the effect of this law as I understand it would prevent you from replacing those lenses without another prescription.

The Witness: That's true.

Judge Murrah: And you say that by doing so it deprives you of the right to replace a lens, which also might deprive you of a sale?

The Witness: That's correct.

Judge Murrah: Of a frame.

The Witness: Uh huh.

Judge Murrah: Now then, as I understand it, you say that would have the effect of diverting those replacements into another field?

The Witness: I believe it would.

Judge Murrah: Away from you.

The Witness: Uh huh.

Judge Murrah: Now is that primarily the detrimental effect of which you speak?

The Witness: Yes, I would say so.

Judge Murrah: Are there any others that you think of? [fol. 318] The Witness: No, but I think that's bad enough.

Judge Murrah: That's all right; I didn't mean to minimize that at all. Now if it also forbids you or anyone else, I suppose, to advertise under certain conditions——

The Witness: (Interposing) Yes, sir.

Judge Murrah: How would that affect you?

The Witness: Well, we, that wouldn't affect us too greatly. We are not too much interested in advertising.

Judge Murrah: You don't object to a regulation of that kind, do you? I didn't mean to put it like that. Do you object? That's what I mean.

The Witness: Well, I believe that certainly if a person has an expensive ground floor location he should be able to display frames in the window.

Judge Murrah: This law does, as you understand it, have the effect of preventing that?

The Witness: Oh, positively.

Judge Murrah: Yes.

The Witness: And I believe that we should be able to do our telephone directory advertising, which is not blatant advertising. It is all, most all of the advertising that would be done by most of us would be authorized by the Guild, and they have a very ethical approach to advertising.

Judge Murrah: What about your kick-backs? As I understand, there is a provision of the law that would forbid [fol. 319] you to kick-back to the ophthalmologist; I use the word "kick-back", I suppose there's——

The Witness: Rebate, kick-back. Well, of course, that thing was settled a long time ago. The Federal Government took care of that. Consent decree was signed back in the fall of 1951.

Judge Murrah: You don't object?

The Witness: Oh, certainly not.

Judge Murrah: Then what we are litigating about here is the question, is your right primarily to replace lenses and the effect that that has.

The Witness: Yes, sir. Of course I think that is our right.

Judge Murrah: Within the boundaries that you have stated of advertising.

The Witness: Yes, sir.

Judge Vaught: Maybe I misunderstood you, Mr. Daugherty Do I understand that it is the contention of the State that an optician has no authority under this law to fit the glasses and do what he did here in the court room as he demonstrated, adjust glasses and fit them to the patient's eyes, unless he has a prescription, unless it's specified in the prescription?

Mr. Daughterty: No, sir, we do not contend that the prescription need specify the fitting data, you Honor. [fol. 320] We do not contend that. We contend that before an optician can have the lenses ground, that he must have a prescription, and then when they come back to him, or else he grinds them himself which is not the case here, then he can fit that to the face. Now some prescriptions may contain fitting data, such as the distance before the eyes or angle in or other fitting data, bridgework and the pupillary distance.

Judge Vaught: According to the petition now and to the answer, they plead (reading) Plaintiffs have always rendered and are now rendering such service as the repair of broken eyeglasses and frames, the duplication of broken eyeglass lenses, the duplication of eyeglasses and the lenses contained therein, placing and replacing lenses in the frame and fitting, adjusting and adapting and applying to the face lenses, frames, prisms and other optical appliances and other similar services.

Now then, in your answer—defendants admit that material allegations of fact set forth in paragraph 11, but allege that the acts which Lee Optical of Oklahoma and Ellis Carp, Douglas Optical Company, as set forth in said paragraph, violate the provisions of House Bill Number 663.

Is it your contention that Mr. Hill here, for instance, has

no power under that law to fit these glasses, adjust them to the face of the patient?

Mr. Daugherty: Your Honor, I think I will have to answer [fol. 321] that this way: That before an optician should undertake to furnish lenses to a person, he should have the doctor's prescription. If he has the doctor's prescription, it is then filed and then he has the permanent right to fit and adapt and adjust the glasses to the face. That doesn't have to be in the prescription unless certain features are required. I don't know that I am answering your Honor's question, but it is our contention——

Judge Vaught: (Interposing) Assuming now there is a prescription, he has a prescription from John Jones, and he selects a pair of glasses, that is frames he has the lenses fitted according to the prescription; now is it your contention that he hasn't the right to put them on——

Mr. Daugherty: (Interposing) No, sir.

Judge Vaught: Your pleadings are different.

Mr. Daugherty: Well, the pleadings will be changed if it says that, your Honor, but we certainly do not.

Judge Vaught: I think it's very material.

Mr. Daugherty: We certainly do not contend that he is not entitled to fit and adapt and adjust under the circumstances you outline.

Mr. Woods: Of course, if your Honors please, that makes quite a difference in this lawsuit in their position. As we understood their pleadings, they were saying that the acts we have discussed that are involved in this Act, the [fol. 322] fitting, applying, adjusting to the face, duplication of lenses, replacement, all of those constitute the practice of optometry, based upon their specific positive allegation in paragraphs 5 and 8 of their answer.

Now as I understand Mr. Daugherty, he says that that isn't what they are contending or what the law means.

Judge Murrah: That is the question that came up earlier this morning in the proceedings, that is this morning; I think we should settle the pleadings on that, and the issues raised by the pleading, that is, may the optician when he has a prescription from an ophthalmologist or optometrist fill that prescription by fitting, adjusting and adapting to the face, as the mechanical—it's obviously a mechanical

function. It's a function that certainly no one could arrogate to a profession.

Judge Vaught: I think you ought to clear that now, so we'll know what we are trying.

Mr. Duvall: If the prescription simply provides for the lens and nothing more, it gives no directions as to fitting, gives no directions as to adjusting, gives no directions as to the type of frame or anything else, just the lens power; then under this statute under our pleadings and their answer, then that is prohibited by this bill. He can't do anything but get the lens.

Mr. Daugherty: That has never been our contention. [fol. 323] That is not our contention.

Judge Murrah: The optician says he does nothing except in accordance with his prescription, except to replace the lens.

Judge Vaught: And adjust.

Judge Murrah: I know, of course; you mean if the prescription doesn't prescribe the pupillary distance from the cornea, and matters of that kind, which is rare, the type of frame, then he is free to exercise his own skill and his own judgment?

Mr. Woods: That's right.

Judge Vaught: Defendant agrees to that?

Mr. Daugherty: That's entirely correct.

Judge Murrah: And of course the Court has in mind what their witness this morning said, and I believe the testimony was that only in rare instances where you had, he didn't use the word, but a deformity of the face or an unusual situation of the features which required special treatment that would of course be in a prescription, and I assume that the optician would follow the prescription in that respect, but if he didn't have a prescription he wouldn't be dealing with the question, isn't that right?

Mr. Daugherty: That's right.

Judge Murrah: An optician wouldn't be dealing with it, wouldn't have the problem before him if he didn't have a [fol. 324] prescription for it, because he never sees the patient in the first instance unless he does have a prescription; and I suppose that if he was refilling it, replacing it, I understand this witness to say he would either have the pre-

scription on file or he would take the power, take it from the lensometer. I suppose the lensometer would give that data?

Mr. Woods: I am not clear what data your Honor refers to.

Judge Murrah: Would it give the unusual situation about the pupillary distance, and also the axis, that difference in the axis that Mr. Duvall had—a compound on one side and a sphere on the other?

Mr. Woods: To answer your Honor's question, the lensometer will give the power of the lens. Of course it can't give the interpupillary distance because that can only be determined by measuring the eyes.

Judge Murrah: Very well.

Mr. Woods: It also will give you the axis, providing that the lens is either in the frame the way it was mounted, which of course determines and fixes that axis with relation to that frame. It can then determine it; or if you put the lens blank in the same position in the frame, then it gives the axis, and that is where it comes in, these fragments. If you have a small fragment you can't tell how it was in the frame, and if there is a cylinder involved, which is only, as I under-[fol. 325] stand it, used in case of astigmatism, the fragment would be too small, you couldn't tell just what position it was, you could'n't get the axis.

But now with respect to their position, if your Honors please, I think that if that is their position, it is not what they have pleaded, and I think that then their answer should be amended to say they aren't making the contention that doing these acts the optician is both violating this law and also violating the practice of optometry statute and the medical practice statute.

Mr. Daugherty: When the evidence is all in, we may desire to amend this petition, the answer, but I am advised by co-counsel that the evidence may substantiate this position.

Judge Murrah: Very well.

Judge Vaught: I think you should clarify it before you——

Mr. Daugherty: I think the point you have, your Honor, in mind is that question about can he fit and adapt when he gets the prescription.

Judge Murrah: Yes.

Judge Wallace: If that's the case, Mr. Daugherty then, you are admitting Section 2 is unconstitutional, as I view Section 2, because it just states very plainly that a man can't do that unless he has—let's see—"* * * to give [fol. 326] any treatment or training designated to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes, 1951, may in a written prescription, or its duplicate * * *"—or he can do what this man was doing, Mr. Hill was doing there when he fitted those glasses to Mr. Phillips; is that right?

Mr. Daugherty: I don't believe he has to be an optometrist to do that. I think all optometrists can do it.

Judge Wallace: It says licensed under the provisions of Chapters 11 or 13, has to have the qualifications of an optometrist.

Mr. Daugherty: We don't interpret it that way, your Honor.

Judge Murrah: How do you interpret it, then?

Mr. Daugherty: We interpret it, Judge, we interpret that from the start-off with the eye examination, it must be made by a professional man; then he fits, he may grind that lens if he wants to, then he may fit it to the face; but if the professional man, and this is normally the ophthalmologist, it could be an optometrist, if he wants someone else to dispense that, then he may send that prescription to a dispensing optician, and in accordance with the prescription he may have the lens ground, and then he may fit the glasses [fol. 327] to the face of the patient.

Judge Wallace: That isn't what Section 2 says.

Mr. Daugherty: I believe that is the intention of the Legislature, your Honor, whether it says it or not.

Judge Murrah: I think we will have to accept the Attorney General's interpretation of any construction made upon it to determine the constitutionality; it would be our duty to give the constitutional interpretation, if we can.

Mr. Daugherty: That's true. We don't interpret it that the prescription needs to contain data on that, except some prescriptions do, like the distance before the eyes and angle in or maybe a——

Judge Wallace (Interposing): Well, it says, "It shall be unlawful for any person, firm, corporation, company or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes, 1951, to fit, adjust, adapt, or in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this section, except that persons licensed under the provisions of Chapters 11 or 13 of [fol. 328] Title 59, Oklahoma Statutes, 1951, may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eyeglasses, prisms, tinted lenses, frames or appurtenances thereto * * *".

Well, do you concede that it's not necessary then for this man to qualify as an optometrist to do that?

Mr. Daugherty: He does not, sir, in our opinion, he does not. What this means, coming down to where we find the word "except", the law says that these professional men did all of these things, except that they permit certain things to be done on their prescriptive authority. Those things are to interpret their prescription, and then in accordance therewith after the same has been interpreted, the glasses prepared, they may then fit them to the face of the patient, provided, and this is a very important provision of that section, "provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person."

Now it's the purpose of the Legislature to make the professional man responsible for the eye care. If he wants to delegate part of it to someone else to do, such as a druggist or an anesthetist, something of that kind, he may do [fol. 329] so, but he himself is responsible to see that it is properly done.

Judge Wallace: Dr. Coston said this morning that it

didn't make any difference if the glasses were not properly fitted, no injury.

Mr. Daugherty: No, sir, no permanent damage to the structure of the eye. He did say that it could be aggravated, but he did say that there could be a loss of efficiency or could bring about a nervous condition. I think it would be no more or less at the most than that. As far as damaging the structure of the eye, no one will wear glasses that would do that so long that it would occur, but there can be damage to the efficiency of the person, there can be damage to his nervous system, there can be discomfort to the person, which in general terms definitely pertains to the health and welfare where if he has got properly fitted glasses, he won't suffer from nervousness, discomfort, loss of efficiency. That is the police power exercised by the Legislature to avoid those things.

Judge Murrah: Our first duty is to pinpoint the impact of this law.

Mr. Daugherty: Yes, sir.

Judge Murrah: What is the incidence of the law upon these plaintiffs, and that largely depends for the purpose of this case upon your interpretation of what you contend [fol. 330] that it does, and if you say it doesn't do this, we would accept that, of course. That does not mean that we might not accept that, but if you say, if the Attorney General says it doesn't prevent them doing this or that or the other, I think we'd be bound, I think we'd accept that because we certainly wouldn't read something into the law which the Attorney General said was not prohibited.

So it's tremendously important, it seems to me, for us to determine just exactly what you contend.

Mr. Daugherty: That's correct. May I point out that——

Judge Murrah (Interposing): You don't have to just now.

Mr. Daugherty: Yes, sir.

Judge Murrah: But keep that in mind with respect to the proof. We don't want to go far afield on proof on the issue that you don't contend for.

Mr. Daugherty: That's right. That is plain, sir.

Mr. Woods: May the Court please, one thing while we are on this that I want to mention, because I don't believe I have made it clear. As we understand the issues that have been

framed by the pleadings in this case, and by their application to this statute, a dispensing optician, such as Mr. Hill, cannot sell frames for eyeglasses. Suppose one of your Honors would want a new pair of frames for his eyeglasses, he [fol. 331] cannot go to Mr. Hill and purchase those frames and either have the lenses just like they are in your existing glasses inserted in those or your old lenses taken out of your old glasses and put into new frames, without a prescription.

Judge Murrah: I think that is important. There seems to be a thin dividing line between constitutionality there.

Judge Vaught: Does the State contend that?

Mr. Daugherty: I was lost in his question.

Judge Vaught: Do you contend that if an individual who has a pair of glasses goes into Mr. Hill's store, for instance, and he wants to get a new pair, a new frame, and he wants him to take the lens out of the old frame and put in the new one, you say that he can't do that without a prescription?

Mr. Daugherty: One moment, sir, I was just trying to get——

Judge Murrah: Do you or don't you?

Mr. Daugherty: On my feeling, my feeling is that the law does not prohibit a duplication of frames, does not prohibit duplication of frames, but it does prohibit the duplication of lenses.

May I have a moment to confer with counsel here?

Judge Murrah: We will not bind you to that, but you [fol. 332] can readily see how vastly important that may be in this case, because arrogating one business to another without any——

Judge Vaught: What do you say about putting them in new frames, not any lenses in that; and a great many of these frames are as much for decorative purposes as anything else. You say he can't sell those or he can't advertise them, he can't exhibit them in his place of business so the public may see them?

Judge Murrah: For instance, Judge Vaught has this in mind, if I may—suppose that my wife has a prescription from her doctor, either an ophthalmologist or an optometrist, and she wants a calico frame and she also wants different colored frames and different designs to wear with different

creations, which she doesn't have, but suppose she did: Now Judge Vaught's inquiry is, can she go down to her optician, who has her prescription, and have two or three different sets of glasses made?

Mr. Daugherty: Very definitely.

Judge Murrah: I think that as far as my thinking is concerned, it's the question that we have in mind, can she buy half a dozen glasses, sets of frames.

Mr. Daugherty: Without a doubt.

Judge Murrah: Made on the same prescription?

Mr. Daugherty: Without a shadow of a doubt she can do that. She would not need a new examination, just need [fol. 333] the prescription.

Judge Murrah: The law does not prohibit Mr. Hill from selling those frames?

Mr. Daugherty: It says he may do that, "and may continue to do the said acts on the aforesaid written prescription."

Judge Murrah: May continue to.

Judge Vaught: Getting back to the other question. Now these frames, they have a great many of them on hand, and they have them exhibited in public places there, you know; in other words, they are advertising that they have these frames. Would you say that was prohibited under the law?

Mr. Daugherty: I believe it is, your Honor, under the bait advertising provision, which is the provision to prevent people from drawing people into a non-professional establishment in search of glasses, or thinking that they could get eye examination or get glasses. I believe that comes within the bait advertising provision of the law, and I think it's amply supported by Supreme Court opinions throughout the country.

Judge Murrah: That relates to another subject. May I inquire from this witness, of course judges don't live in a vacuum and don't decide lawsuits in a vacuum. Between this building and the downtown section there are, I believe [fol. 334] that I recall offhand there are three different dispensing stores, one on the east side and one on the west side, and one on the——

The Witness: Two optometrists and one dispenser.

Judge Murrah: Well now, where is your place of business?

The Witness: Mine is the corner of Couch Drive and Robinson, the Liberty Bank Building.

Judge Murrah: There is one immediately north?

The Witness: That's Dr. Harlow, the optometrist. That's the Petroleum Building. He's right directly north of me; and there's a Dr. Richardson that's also an optometrist and he's on Robinson on the west side of the street just up, well, down this next block here.

Judge Murrah: Do you display glasses in your place of business?

The Witness: Yes, sir.

Judge Murrah: Does he?

The Witness: He hasn't, not since all the ruckus took place Dr. Harlow has.

Judge Murrah: Dr. Richardson does not?

The Witness: Dr. Richardson does not, but of course prior to this law, practically every optometrist who had a ground floor location did display frames.

Judge Murrah: But they have quit?

[fol. 335] The Witness: Yes.

Judge Murrah: If they did before, they do not do so now?

The Witness: That's right.

Judge Murrah: All right, thank you.

(Witness withdraws.)

Judge Murrah: Call your next witness.

Mr. Woods: Yes, sir.

Carl C. Barber, called as a witness on behalf of the plaintiffs, being of lawful age and having first been duly sworn, testified as follows:

Direct examination.

By Mr. Woods:

Q. Will you state your name to the Court, please?

A. Carl C. Barber.

Q. Where do you live, Mr. Barber?

A. Houston, Texas.

Q. And what is your business, sir?

A. An ophthalmic dispenser, or dispensing optician as it is commonly called.

Q. For how long have you been so engaged, Mr. Barber?

A. Nineteen years.

Q. Of what association are you a member?

A. The Texas Association of Dispensing Opticians and [fol. 336] the National Association of Guild Prescription Opticians of America, and the International Guild of Prescription Opticians.

Q. Are you a member of any committees of the Guild of Prescription Opticians?

A. Yes, sir, I am a member of the Medical Relations Committee, the Membership Committee, and a director in the National Guild.

Judge Murrah: At this point the Court will recess for five minutes.

(Whereupon a brief recess was taken, following which the proceedings continued with the same counsel present.)

Carl C. Barber, the witness on the stand when the recess was taken, resumed the stand and testified further as follows:

Direct examination (continued).

By Mr. Woods:

Q. I believe my last question to you was, are you a member of any committee of the Guild of Prescription Opticians.

A. Yes, sir, I am a member of the Medical Relations Committee, the Membership Committee, and a member of the Board of Directors in the National Guild.

Q. Are you here today under instructions of the president of the Guild?

[fol. 337] A. That's right, not appearing in behalf of the particular plaintiff in this case, but in behalf of the dispensing opticians in the State of Oklahoma, and to prevent the encroachment of a younger profession upon a field that has existed for hundreds of years.

Q. Now are you certified by the American Board of Opticianry in any respect?

A. Yes, sir.

Q. What certificate do you hold, sir.

A. Master Optician.

Q. For how long have you held that certificate?

A. I believe about three years. Even since its inception.

Q. Your business is in Houston, Texas?

A. That's right.

Q. And what is the specific nature of your business?

A. Dispensing optician.

Q. And you fill whose prescription in the operation of your business?

A. Primarily the ophthalmologists'. We do fill optometric prescriptions when they are brought to us upon the insistence of the patient.

Q. Does that occur very frequently?

A. Very infrequently. We have one young man in the city who practices optometry who is trying to raise his own professional standards, and today is referring a good many of his patients to dispensing opticians, but he is the excep-[fol. 338] tion rather than the rule.

Q. From your knowledge and experience, the referring of prescriptions by an optometrist to a dispensing optician is rather infrequent and rare?

A. It's quite rare.

Q. Now it's true, is it, that in the field of visual care, the three groups are ophthalomologists, optometrists and the opticians?

A. That's correct, sir.

Q. Will you state for the Court from your own knowledge what the history of the optician is, briefly now?

A. Briefly, the history of spectacles begins, well, actually it's lost in the pages of antiquity, but the first recorded knowledge dates about 2000 B. C. among the Chinese when semiprecious gem stones were used, and used primarily for facial adornment and for gazing at the heavenly bodies. They denoted wealth or position or learning, but it wasn't until Marco Polo in, I believe about 1278 A. D., made a trip to China and returned with the first pair of spectacles that were seen in Europe.

Some attribute the invention of spectacles to an Italian

whose name I have forgotten, but I believe actually Marco Polo returned with the first pair.

After that time, glasses were sold, or hawked, by vendors [fol. 339] on the street for a good many years, until later an English scientist, Sir Isaac Newton, and Roger Bacon, discovered that glasses did have material benefit so far as refractive powers, that they aided the vision of old people, a condition which would frequently be described by "the arms getting a little short", and recommended the use of lens for a visual aid.

Shortly after that time, the first guild of spectacle makers was incorporated, granted a charter in England in the year, I believe, 1485 or 1490, or some two to five years prior to the time that Columbus discovered America.

Shortly thereafter, in the early part of the 16th Century there was another guild established in Germany. The Germans throughout the ages have contributed immeasurably to the advancement of optical science. Gallileo, the Italian, Sicilian, developed the first telescope as a visual aid for viewing at long distances.

In brief, the history of the spectacle maker or dispenser antidates the ophthalmologists and the optometrists both by some four hundred years. At the present day it has been developed into a semiprofession or science.

Q. Approximately when did the ophthalmologist become an eye specialist?

A. Appeared upon the scene in the early part of the 18th Century.

[fol. 340] Q. 18th or 19th Century?

A. 19th Century, I beg pardon; about 1815 or 1820. Certain men in the field of medicine began to turn their thoughts to the development of optical science as a definite part of medicine, and they were the first two truly professional groups to develop the science of eye care. It was not until about 1895, I believe, that a group of opticians—at that time glasses were sold readymade prior to that time—a group of opticians decided that they could do examining and perhaps increase their revenues by being able to examine a person's eyes when they came in, and sell them spectacles; and at the same time they had a desire to improve themselves and create a profession, so they branched out and sought legisla-

tion to establish themselves. I think the first law, optometric law in this country was enacted about 1901.

Q. Where was that, if you know?

A. I believe it was in Minnesota.

Q. Now were those men called the refracting opticians?

A. They were. They did not assume the name optometrists until a number of years later, and they apprenticed themselves to other opticians, refracting opticians, to learn what was then considered just a trade, and up until as late as 1925, I believe it was, you could go to the old Needles Institute in Kansas City and take a quickie course and come out a qualified optometrist, start practicing.

[fol. 341] Q. From the time of the separation of your so-called refracting opticians from, what was the other, the remaining part called, remaining group?

A. Dispensing opticians.

Q. From your knowledge and experience of optometry, has it continued to occupy a dual position?

A. It has very definitely. A goodly portion of them solicit prescriptions from ophthalmologists. They advertise in the newspapers. In fact, I would say that about 98% of the optometrists derive practically 100% of their revenue from the sale of glasses, as evidenced by the fact that many, many optometrists throughout the nation advertise their examinations free of charge. They are interested in the sale of spectacles.

Q. And so by that I take it that there is the merchandising capacity or function of the optometrist, and also the legal professional status of refraction?

A. Very definitely.

Mr. Daugherty: I would like to interpose an objection to the form of the question as being leading and suggestive.

Judge Murrah: It is.

Mr. Daugherty: I'd like to lodge an objection to this entire line of questioning as incompetent, irrelevant and immaterial to the issues of this case.

[fol. 342] Judge Murrah: Overruled. We will permit him to give background.

Mr. Daugherty: Have no objection to background, your Honors, but this question of what the optometrists do in

Texas or in other parts of the country I don't think is particularly material to Oklahoma and our law.

By Mr. Woods:

Q. You are testifying with respect to the practices throughout the United States, and including Oklahoma, are you not, Mr. Barber?

A. Yes, sir.

Judge Murrah: You may proceed.

Q. With respect to the merchandising functions of the optometrists what is it that they handle by way of merchandise?

A. Frames primarily, most of us, including the optometrists, have considerably investments in inventory. I personally have several thousand dollars of those tied up in inventory and expensive frames that vary in price anywhere from $6.00 for the lowest to as high as $500.00 for the most expensive.

Q. In a pair of eyeglasses, does the frame or does the lens represent the greater cost monetarilywise?

A. Today, the single vision glass, the frame represents the greatest cost in the average pair. In multifocal lenses, such a bifocal, trifocal, and double seg lens, of course your [fol. 343] lenses are rather expensive.

Q. Now what are the functions of the opticians in the field of eye care?

A. The optician, of course, as has been brought out before, receives a prescription as a rule from the ophthalomologist and occasionally from the optometrists, that gives the refractive power of the lens, the power desired for that patient, which may include spherical correction, cylindrical correction, the axis, the placement of that axis, prism if it's desired, and the addition for reading if it requires multifocal lens. In no cases that I handle do the doctors put the pupillary measurement, and as a rule they never include the type of bifocal. It is then left up to the discretion of the man who interprets the prescription to first analyze the need of the individual. For instance, you as an attorney, would have different visual requirements to the young lady who works in your office who might require multifocal lens,

and she is using the typewriter all day long, your secretary; she is using a "Line-a-time" that sets back of her typewriter. Her visual requirements are different to your own. You might both have a comparable prescription, you might both require bifocals, but her needs would be entirely different to those of your own, because you are concerned with work on your desk, so the placement of those bifocals before the patient's eyes have a very definite bearing upon [fol. 344] the comfort of that patient and her ability to perform efficiently her work for you.

Q. In that connection, what does the optician do?

A. We take the measurement for placement of segment, determine the type of segment that would best meet her specific needs and your own, and also the type of lens that would be best suited to the particular type of correction that you might be wearing.

In addition to that, you have to determine the facial measurements, the size of the bridge, the placement of the pads upon the bridge for the greatest possible comfort, and for the positioning of that segment before the eyes, the temple measurements, the adjustment and fitting of temples over the ears so that it will firmly anchor that lens in the proper position before the eye and hold it there comfortably, because without comfort from the frame the lens will never perform its duty as it should be, because the patient simply won't wear it in the proper position.

Q. Now in those functions, do you have anything to do with respect to the frame that is going to be dispensed to that person?

A. Very definitely. Of course today with the styling of the frames, it has become necessary that a man be something of a cosmetologist as well as an optician in order to carry out a successful practice, because you must be able to help [fol. 345] your patient in selecting styles that are best suited for the particular wardrobe or facial contours, and also that will still carry out the purpose for which the glasses were intended.

In many instances I refuse to fit patients with certain types of frames, because I know that due to some facial deformity or something of that sort the patient may have that you cannot properly place those lenses before the patient's

eyes, and give them the vision and the comfort that glasses were designed for.

Q. Does the type of frame chosen by the patient or dispensed by you have any relation to the efficiency of the lenses prescribed?

A. It does in many instances, yes.

Q. In what respect now?

A. Well, for instance, there are many, many people, due to the styling factor, who desire plastic frames, colorful plastic frames, perhaps with a woman, with a beautiful gold trim or rhinestone trim, and yet she may not have a bridge that is suited to the fitting of such a frame; a very narrow bridge or an unusually wide bridge would not permit you to properly position those lenses before the eyes to give her the comfort that she was entitled to and that the doctor intended her to have, and it would make a very definite difference in her visual efficiency.

[fol. 346] Q. Does the type of frame dispensed have anything to do with the wearing of the eyeglasses by the patient, any connection?

A. Well, yes, of course, if it isn't comfortable the patient isn't going to wear it and they have wasted their money.

Q. And now you were in the court room, I believe, and you heard Mr. Hill testify about the functions of a dispensing optician?

A. Yes, sir.

Q. You heard that testimony?

A. Most of it.

Q. Is what Mr. Hill testified as to the functions of the dispensing optician in accordance with your knowledge of his historic and present day functions?

A. Yes, sir, it is.

Q. And are those functions, in your opinion, an important part of the eye care rendered by the ophthalmologists throughout the country and in Oklahoma, particularly, today?

A. They certainly are, because the ophthalomologist in his practice is concerned primarily with the treatment of diseases of the eye, and surgery, as well as refracting. He has no time for commercialism in his practice, in the majority of cases. There are exceptions, of course, as we all

recognize; but it requires a great deal of time, a great deal [fol. 347] of skill and a great deal of patience on the part of the individual interpreting those prescriptions and making the glasses, and no busy ophthalmologist could devote his time to that; otherwise he would have no time for his practice of ophthalmology.

Q. In your opinion, what is the character of the acts performed by the optician?

A. Well, the interpretation and fabrication of raw materials into a finished product that will give the patient the most comfortable vision and the greatest visual efficiency, and it's done through first, of course, the processes that have been outlined before, the grinding of the power into the lens, the cutting, edging, the mounting into the frame, the final fitting, adjustment of that frame for comfort upon the patient's face.

Q. Now in your opinion from your experience, is the dispensing optician a person properly qualified to render that service?

A. I think he is better qualified than any other particular field.

Q. Why do you say that, Mr. Barber?

A. Because we have devoted our time exclusively to that. In the schools of ophthalmology there is no time given to the teaching of dispensing.

Q. Do you mean by dispensing now?

A. Fitting, adjustment of frames to the patient's face. [fol. 348] Q. Yes, sir. Now continue.

A. In the school of optometry, the training of the optometrist in most all instances in the field of dispensing, that is the fitting and adjustment of frames, that training is given by a qualified ophthalmic dispenser or dispensing optician, and that course within itself is very brief. Today they are emphasizing more and more professionalism, and more and more emphasis is upon training in pathology and such as that. Consequently they are giving less time to the fitting, adjusting, or to the field of dispensing; so I think that we ophthalmic dispensers are better qualified than any other field to properly fit and adjust the glasses on the faces of the patients.

Q. Is the duplication of lenses of eyeglasses a function within the field of the optician?

A. Yes, sir, it has always been, ever since the time of the history of the first pair of glasses, that's been part of our function and it has a definite bearing upon our business.

Q. Now is that also true of placing into frames of old lenses from former glasses?

A. It is, because many, many times in a city such as our own, we of course have thousands of visitors in the city every day, and many times I have put the lens of some patient, a visitor in our city, into a new frame, due to accident. [fol. 349] In fact, I so happened to have an attorney in my office a few weeks ago from Oklahoma City, who was working with the firm of Baker, Botts—Houston, and he had broken his glasses, his frame, and that man was wearing a trifocal. He simply could not have appeared in court that day without his glasses. With such a law as is proposed here, the man had he come into my place and I were practicing here, I could not have placed his lens into a new frame. He would have had to have gone to some person, had his eyes examined, or else written to Oklahoma City and gotten his prescription and then let them be done.

Q. Now is the duplication of eyeglasses, by that I mean the formulation of extra or two extra pairs of eyeglasses, a large part of the optician's function in his business?

A. A very large part today, because people have become more conscious, more eye conscious, and they realize the importance of their glasses, both as a physical aid, consequently more of them today have extra pairs; they also wear them as complements to their costumes, their mode of dress, particularly so with women, but that is a very definite part, a large part of our business today.

Q. Do you know whether or not when you do not have a prescription from that patient, but he brings in the glasses, that that is done by duplicating the lens pursuant to the measurement of the power of that lens on the lensometer? [fol. 350] A. That's correct, sir. The lensometer is a very precise instrument that gives us the power of a lens very accurately, and if we have a sufficiently large piece of the glass, or an entire lens, then we can duplicate accurately. As respects the turning of a lens in the frame, with the frames which we have today, the odd shapes and such, there is very little chance of a lens turning in the frame. It can,

of course, happen, but if the patient is wearing it comfortably in that position, and usually by looking at the frame you can tell if the lens has turned, due to the odd shapes, we question the patient. If the patient has worn it comfortably in that position, naturally that is the position in which it will be duplicated, although that may not have been conforming entirely or accurately to what was originally prescribed.

Q. In your opinion, would the business of a dispensing optician be materially affected if he could not sell frames, if he could not remove lenses from previous frames and insert them in new frames, if he could not duplicate lenses, if he couldn't place or replace lenses in frames without the prescription of a licensed medical doctor or an optometrist?

A. I think it would break most dispensing opticians, because without that, those extra pairs and the duplications and the replacement of frames, my own business and that of every dispensing optician would drop at least forty to fifty percent.

[fol. 351] Q. Now in your opinion, is there anything in the interests of the public health or welfare that would require that those functions, that is the removal of lenses from old frames and inserting into new frames, the selling of frames, the duplication of lenses, or the placing or replacing of lenses into frames, that is required to be done only by an ophthalmologist or an optometrist?

A. No, sir, I do not.

Q. Or only upon the prescription of optometrists or ophthalmologists?

A. No, sir, I surely do not.

Q. Can you state approximately what percentage of the eyeglasses dispensed in the United States are dispensed by optometrists?

A. In a survey which the National Guild made last year, we found through the gathering of evidence throughout the nation, in fact in all forty-eight states, that there is approximately sixty to seventy percent of the eyeglasses dispensed in this nation today is done by the optometrists.

Q. Yes, sir. In your experience, do you know where optometrists generally have their offices?

A. Primarily in the retail sections or business sections

of the community, either suburban or downtown, and as a rule in ground floor locations, with displays of merchandise, the same as I and others.

[fol. 352] Q. And those locations are generally in retail type areas?

A. Definitely—jewelry stores and such places as that.

Q. Now in your opinion, is the advertising by dispensing opticians detrimental to the public health and welfare?

A. I think it's beneficial, because eye care today has become as important as the care of the teeth. That was brought about by dissemination of information to the public, and I think it makes the public more eye conscious, and brings about better eye health, as long as advertising is done in an ethical manner I see no reason to restrict it in any way whatsoever. It would hurt many of us in the field of dispensing opticianry because we do carry ads, ads that are in good taste, I might add.

Judge Murrah: Mr. Counsel, do you think what this witness thinks about this has any bearing upon the immediate question involved? I don't.

Mr. Woods: Very well, your Honor.

Judge Murrah: It wouldn't make any difference to me what he thinks about it

Mr. Woods: Very well.

By Mr. Woods:

Q. Mr. Barber, do you have any personal knowledge of what is being done by the American Board of Opticianry with respect to the qualifications of dispensing opticians?

A. Yes, sir, they are raising a fund to create an endow-[fol. 353] ment for the establishment of a school to train men in the field of opticianry, that men in the future may be better qualified, and also seeking to aid optical dispensing optician groups in the various states to bring about legislation so that it will be regulated, because that is the only way that you can establish and definitely ascertain the qualifications of a man to enter a particular field.

Q. To your knowledge are there schools for the training of opticians?

A. Yes, sir.

Q. Do you recall where those are?

A. There is one very good school in Rochester, New York; there is a school in the City of New York; there is another in California; and we are contemplating such a school in a junior college in Texas.

Q. I hand you what is marked for identification as Exhibits 14 and 15 and I will ask you to just state what those documents are.

A. The examination and written test given by the American Board of Opticianry, or by the School of Opticianry, and outlines of courses, prescribed courses of the schools teaching opticianry.

Mr. Woods: Plaintiffs offer in evidence Exhibits 14 and 15.

Mr. Daugherty: We don't feel that it is material and [fol. 354] interpose an objection for that reason.

Judge Murrah: Overruled. They will be admitted.

(Plaintiffs' Exhibit 14, being document "Selected Examination Questions and Written Tests", having previously been marked for identification, was received in evidence.)

(Plaintiffs' Exhibit 15, being document "Outlines and Syllabuses", having previously been marked for identification, was received in evidence.)

Mr. Woods: You may inquire.

Cross-examination.

By Mr. Daugherty:

Q. Mr. Barber, are you from Houston, Texas?

A. Yes, sir.

Q. Are you a dispensing optician in Houston, Texas?

A. Yes, sir.

Q. How long have you been in business for yourself, Mr. Barber?

A. Nine years and about eight months.

Q. That is as a dispensing optician?

A. Yes, sir.

Q. Do you do your own lens grinding in your place of business?

A. No, we do only finishing work.

Q. Where do you get your lenses ground?

A. From optical supply houses.

Q. In other words, when you get the doctor's prescrip- [fol. 355] tions, you do not duplicate the lens or you do not prescribe the lens or grind the lens, I should say?

A. No, sir, the actual grinding we do not.

Q. Do you send that prescription to the supply house; is that how that is done?

A. That's right. We buy the so-called finished lens and then cut and edge it and mount in the frame.

Q. Would you require a prescription from an ophthalmologist or an optometrist before you would fit me with a pair of glasses?

A. If you had no pair of glasses that I could duplicate, yes, sir.

Q. In other words, with the exception of the process of duplication, you wouldn't attempt to furnish me with a pair of glasses unless you had in your possession a prescription from a qualified professional man, either an optometrist or an ophthalmologist?

A. No, sir, I would not; I am not qualified.

Q. Now on the duplication matter, how would you duplicate these lens?

A. By the use of a lensometer, which is the instrument known to all of us.

Q. If you had my prescription in your office, would you order my glasses from that prescription?

A. Yes, sir, I would.

[fol. 356] Q. Would you prefer that over the lensometer check?

A. I always prefer it because it is a much simpler matter, and there is, of course, always a possibility of human error.

Q. Yes, sir. Isn't it also true that the prescription recites the doctor's exact desires as to how he wants the lenses prepared?

A. That's correct, sir.

Q. Now isn't it correct that there is some human element involved which might result in error, in the duplication process from the lensometer?

A. There is always the possibility. There is very little possibility of it with a qualified optician.

Q. I am talking about qualified; are there unqualified opticians?

A. I am sure there are. There are unqualified men in every field that I know of.

Q. If I took my glasses to an unqualified optician and he attempted to duplicate them on the lensometer, might he get my prescription all mixed up and deliver me with glasses that would not comply with what my doctor wanted me to have?

A. It's entirely possible.

Q. Is this machine capable of getting out of adjustment?

A. Not without serious abuse or damage.

Q. Do they wear out?

A. Well, I have one in my office that has been in use for [fol. 357] eight years, and I just recently bought a new one. It's as accurate as, or equally as accurate as the new one. It's very rarely that they ever wear out. It's a good investment.

Q. Now when glasses are prepared from a prescription, is there some acceptable tolerance from that prescription which is usually permissible?

A. Yes, sir, there is.

Q. If it is attempted then to furnish me with a set of glasses from the glasses that I have rather than my prescription, by use of the lensometer to ascertain my prescription, does not the lensometer get the prescription of the glasses, provided that there is no human error, rather than the prescription of the doctor which he may have prescribed?

A. That's true.

Q. When someone comes into your office with a pair of glasses and asks you to duplicate them, do you ever inquire into whether or not the glasses are comfortable?

A. Yes, sir, I do.

Q. If the patient says they are not comfortable, what do you do?

A. I recommend that they get their eyes reexamined.

Q. Can you state to the Court that all opticians would do that?

A. I think a majority of them would, sir.

Q. Would some of them likely go ahead and duplicate

[fol. 358] for money rather than have the patient go back to his doctor for a check?

A. There are men without a great deal of conscience in every field. I am sure that some of them would.

Q. Is it possible that someone may come into your place of business and ask you to duplicate a fragment of a lens that might not be of adequate size to permit you to duplicate it?

A. Yes, sir, that has occurred in many instances.

Q. Might not some of these unqualified and unscrupulous opticians that you have mentioned endeavor to duplicate that lens in order to make a sale?

A. I hardly think so in a case like that.

Q. You do not think that is a possibility?

A. I don't think that it's even a probability. I don't believe any man, no matter how unscrupulous, would go so far as to stick his neck out to try to duplicate a lens from a tiny piece of glass.

Q. You think in every case then that the opticians that we have, the dispensing optician, would insist and see to it that the patient go to the doctor?

A. Yes, sir, either that or wire to the city where the man was from and get a copy of the prescription.

Q. If you would undertake to duplicate my glasses here and give me a new pair of glasses, would you also fit them to my face?

[fol. 359] A. Yes, sir, I surely would.

Q. Would you know from my duplicated glasses the distance that the lens should be in front of my face, if I was a post-operative cataract case?

A. I could determine, sir, by your vision, and the comfort of your eyes and by questioning you through subjective questioning I could determine whether or not it was properly placed.

Q. As a matter of fact, isn't the doctor the one to decide distance before the eyes the lenses should be in a post-operative cataract case?

A. No, sir, I don't think so. In post-operative cataract cases, the ophthalmologist frequently gives us the distance at which the examination was made, yes, and we try to fit it at that distance, but in nine out of ten cases that has to

be altered, because when the patient starts wearing them, he will usually find that there is a slight variance of perhaps one of one and a half or two millimeters in the position of that lens to give the greatest possible comfort for all visual activities, whereas under the subjective examination he was looking at a fixed point at infinity during the portion of the doctor's examination, and his visual requirements in everyday life are entirely different, and they seldom ever come out to remain in exactly in that position.

Q. Does the physician give you this distance that the [fol. 360] glasses should rest before the eyes on his prescription?

A. 98% of the cases they do not.

Q. In cases where they do put it on the prescription——

Q. (Continuing) —can you tell that distance from this pair of glasses I hold in my hand?

A. No, sir, I cannot, but I could tell soon whether it was in a comfortable position by fitting it on your face.

Q. You wouldn't have the information as to the exact distance my doctor wanted my lenses to rest before my eyes?

A. The doctor wants them to set in the position that will give you the greatest possible comfort, not at any specified distance, unless it provides the vision for which the glasses were intended, sir.

Q. But that will be the distance that the doctor wanted it, though?

A. It may not be the distance that he wrote on there.

Q. If someone comes into your place of business with a pair of glasses and wants them duplicated, do you ever inquire as to when they had their last eye examination?

A. Yes, sir, I do frequently.

Q. What is the purpose of making that inquiry?

A. Well, there are two purposes, to be quite frank about it: First, I am interested in the patient's comfort and his vision, and if it's been four or five years, I think it's rather [fol. 361] foolish for the man to spend his money on having a lens or a prescription duplicated that is that old, when in all probability there are changes that have taken place within the eye, and they probably could use to advantage a new examination; and at the same time, to be quite honest about it, I would refer that man to an ophthalmologist

because the fact is that is where a majority of my business is derived from.

Q. Do you have any rule of thumb as to when you decide that a prescription has been filled too long back to permit you to duplicate?

A. No, sir. I question the man as to whether or not he is comfortable, and if he has any particular complaints.

Mr. Daugherty: That's all.

Mr. Woods: That's all. Thank you, sir.

Judge Murrah: Let me ask you just one question.

The Witness: Yes, sir.

Judge Murrah: I am not so sure that I reconcile your testimony with the testimony that has been introduced. You heard Mr. Hill testify?

The Witness: Yes, sir.

Judge Murrah: As an optician in Texas do you perform any functions that he does not in Oklahoma?

The Witness: No, sir.

Judge Murrah: Well, I understood you to say that you [fol. 362] are interested in the comfort of the patient's eyes.

The Witness: Yes, sir.

Judge Murrah: From a refractory standpoint?

The Witness: Well, the placement of the glasses on the patient's face has a great deal to do with the comfort of his eyes.

Judge Murrah: Well, I understand that. Does that involve mechanical skill?

The Witness: Yes, sir.

Judge Murrah: Nothing else?

The Witness: No, sir.

Judge Murrah: You don't purport to exercise anything except mechanical aptitude, a skill, beg pardon?

The Witness: Mechanical aptitude to place the glasses in the most comfortable position and to afford him the most comfortable vision possible at the same time.

Judge Murrah: Well, then, you do not lay any claim to professional acumen which Mr. Hill did not profess here?

The Witness: No, sir.

Judge Murrah: That's all.

(Witness withdraws)

Mr. Duvall: If your Honors please, we have a short stipulation with reference to Mr. Hill, one statement that if the question was asked, and counsel agrees that he would testify, had he been asked, that he does do an interstate business, [fol. 363] shipping glasses outside of the state.

Mr. Hansen: We agree to that, your Honor.

Judge Murrah: So stipulated, so agreed.

Mr. Woods: At this time, your Honors, we have some formal exhibits to offer. They are already marked. I just want to offer them at this time.

Judge Murrah: Will there be any difficulty, any question about them at all?

Mr. Daugherty: I don't know what he has in mind, your Honors. He presented to me a large number of magazine articles and we consider them as heresay evidence.

Judge Murrah: Very well.

Mr. Daugherty: Incompetent, irrelevant and immaterial as we view them. I won't say I have seen them all. I saw a large stack of them and looked at a couple of them and that's about the size of it.

Judge Murrah: Are you prepared to object to them?

Mr. Daugherty: Yes, if that is what he has to introduce.

Mr. Woods: I have these depositions right now.

Mr. Daugherty: There is no objection to the depositions.

Mr. Woods: I think there are about eleven or twelve of those articles that I showed to him at the office the other day. [fol. 364] Judge Murrah: Now if there is any question about them and you haven't had the opportunity to examine them or to make an intelligent objection, I think perhaps we should in any event pass it over until in the morning.

Mr. Woods: I intended to give him the opportunity.

Judge Murrah: Very well, do it tonight. Submit them to him so we will be able to expedite it in the morning. It is understood, I assume, that the depositions will be admitted. The Court understands that that was discussed the other day.

Mr. Woods: Yes, your Honor.

Judge Murrah: The circumstance, the purpose for which they are introduced——

Mr. Woods: They are the depositions of the ophthal-

mologists taken at Chicago, of Dr. Benedict, Dr. Culler, Dr. Braley, and Dr. Sheard, and Dr. Emmons at the University of Kansas City.

Judge Murrah: Now generally speaking, is that testimony any different, materially different, than the testimony here today; is it testimony on some aspect of the case which we have not covered?

Mr. Woods: Yes, your Honor. Now the testimony of the ophthalmologists is in line with what Dr. Coston's testimony was this morning. Mr. Sheard is not an ophthalmologist, he is a Doctor of Philosophy and a Doctor of Science and he is head of the Biophysics Department at [fol. 365] Mayo Clinic, and he is an optometrist, and being in that field he testifies as to the functions of the optician, his needs and his vital necessity to the profession of ophthalmology, in that relation.

Mr. Duvall: There are some phases, your Honors, the——

Mr. Woods: Not cumulative, your Honors.

Judge Murrah: That would not prevent them from being admissible.

Judge Vaught: Submit them to the other side, let them examine them and make sure.

Mr. Duvall: We have made copies of the depositions for each member of the Court, for their convenience, your Honors.

Judge Murrah: Submit the copies to Mr. Daugherty if he hasn't seen them.

Mr. Woods: He has a copy of them. These are extra copies for the Court's convenience.

Judge Murrah: Court will recess until tomorrow morning at 9:30.

(Whereupon the evening adjournment was taken, with the proceedings to reconvene tomorrow morning, October 27, 1953, at 9:30 a.m.

[fol. 366] Proceedings

October 27, 1953

Judge Murrah: Proceed.

STATEMENT BY MR. WOODS

Mr. Woods: If the Court please, your Honors, at this time I would like permission to request to address a few remarks to the Court, and those remarks are directed toward what the issues are in this case.

At the time we drew our complaint and filed our brief, we proceeded under the theory that Section 2 of Article 953, by its plain language, required that a prescription be issued and in the possession of the optician for the acts of fitting, adjusting, applying or adapting to the face lenses, prisms; that it be required for the duplication of eyeglasses or the placing or replacing into frames of lenses.

At the pretrial conference, when we were discussing the issues, it is my recollection and it was my understanding that the defendant in the main conceded the correctness of a statement to that effect, and that the issue upon which there might be some basis for disagreement at that time was whether or not that that prescription had to be directed to a particular optical supplier or optician. In our opinion, that was the minimal position of the meaning of Section 2, and it was upon that basis that we proceeded and prepared our evidence.

[fol. 367] When the answer was served upon us on Friday of last week, as I recall, as I construed the issues raised by that answer, and in particular paragraphs 5 and 8, not only did the State accept that issue as it was drawn in the pleadings and as it was discussed at the pretrial conference, but went further; and both of those paragraphs are essentially the same.

I shall direct my attention to paragraph 8, which was in response to paragraph 11 of our complaint in which we set out the plaintiffs were doing all of these things, and that the doing of all of these things, the fitting and the sale and adjusting and adapting of glasses containing lenses prescribed by a licensed practitioner in the State of Oklahoma,

that we were also duplicating lenses and also taking old lenses out of old frames and replacing them into new frames, or making new lenses where a complete duplicate pair of eyeglasses was required and placing those into new frames.

That was admitted in the defendants' answer, and in addition to saying that those acts constituted a violation of Section 953, the defendants went further and said that they constituted a violation of Chapters 11 and 13 of Title 59, those being Chapter 11 the optometry statute and Chapter 13 the practice of medicine statute, which was far beyond their position, as I understood it, at the end of the pretrial conference.

[fol. 368] The State's position in that, and it was reenforced by the brief which they filed with the Court yesterday morning in which they quote an unreported decision in the Oklahoma State Court that held that the judge there held, as I understand the quotation at page 6 of their brief, that the adjustment of lenses into frames, and the adjustment of frames to the face, unless done upon the prescription of an authorized person which gives exact and specific measurements therefor, constitutes the correction, or the correcting or relief of ocular abnormalities by the employment of any means and constitutes the practice of optometry.

In addition to that, as an appendix to the State's brief, is attached a copy of the Attorney General's opinion in 1945 in answer to the specific question of whether the duplication of eyeglasses and the fitting of a customer with frames, or the transfer, as I understand it, of old lenses to new frames, constituted the practice of optometry; and in that opinion the Attorney General indicated under the then existing laws that unless there was a prescription for those services, it constituted the practice of optometry.

Now then, it was upon that basis that we, trying to bear in mind the Court's injunction that we, and our own desire to streamline the evidence in this case as much as possible, developed our case upon that theory.

However, the Court will recall yesterday afternoon a [fol. 369] rather ambiguous position developed so far as the State's exact position on the issues, and in that connection there was some discussion. It is not clear in my mind just what the State's position is, and before we can present

the little remaining evidence we have, I think that that issue has to be clarified, because if I am correct in interpreting what the State may have said at one time, the effect of that, to me, is to read out of the statute words that have a plain and unambiguous meaning.

Now in the first place, quite aside from whether or not the Attorney General of a state with respect to a legislative enactment has the power to, in effect, amend by reading out words that have a plain, unambiguous meaning, we have the situation where counsel as I understand who are appearing in this case as private counsel on behalf of optometrists are making statements as to what the law means.

Now, I don't think, over and above what the Attorney General may say, and throwing that to one side, that statements of private counsel as to what the meaning of this section is can have any binding force and effect. Now in that connection, in the earlier depositions that was——

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Vaught: (Interposing) They are really appearing for the State, are they not, the other party?

Judge Murrah: The Attorney General is here.

[fol. 370] Mr. Woods: Yes, the Attorney General is here.

Judge Murrah: And will undoubtediy speak for the State.

Mr. Woods: I think that is correct, but——

Judge Vaught: (Interposing) I mean the optometrists are not a party to this action.

Mr. Woods: The optometrists are not a party, if your Honor please.

Judge Vaught: It is a matter between the State and the plaintiff.

Mr. Woods: And the plaintiff, that is correct.

Judge Vaught: I just assume that if counsel is representing the State, he has the right to speak for the State.

Mr. Woods: That's right. What raises that particular question in my mind is that in connection with the depositions that were taken here in Oklahoma City it was my understanding that Mr. Daugherty and it appears in there—of course those depositions haven't been introduced into the record yet—that he was appearing on behalf of some optometrists.

Now, it is true he is also appearing here at the same table and sitting with the Attorney General, but I think that raises a point.

Judge Murrah: We will not have any difficulty about that. [fol. 371] You need not worry about that. You just proceed with your argument. I'm sure we will clear that up.

Mr. Woods: Very well, your Honor.

Judge Murrah: It will be the Court's business not to leave the matter in the air as to who speaks for whom.

Mr. Woods: Very well, your Honor.

In connection with these issues, it is very important on the constitutional determination under Section 2, what that language means. If it means, as we read the law and as we understood the meaning at the end of the pretrial conference, then it requires a prescription for the performance of all of those acts not only for the prescription of the lenses in the first instance, we will say where a person is getting a pair of glasses, but also for the purchase of frames at any subsequent time in which those existing lenses might be transferred, or the frames might be broken by a person, or over and above that, where the person may just purely as a matter of taste want a new pair of frames. And, in addition to that, as we read the law, it requires a prescription from a licensed practitioner before a person can go in and buy frames and have lenses duplicated from his existing eyeglasses so he will have extra pairs.

Now as I said, it was upon that theory that we have presented our evidence, and it is important to know whether [fol. 372] that is what the State's position is under the issues as framed in this case. That matter of frames is a highly important item.

Judge Murrah: Yes, we understand your positio. I think that the Court understands exactly what you have in mind.

Mr. Woods: Very well.

Judge Murrah: What say the State?

Mr. Hansen: If the Court please, when I prepared my little trial brief that I filed with the Court yesterday morning, I set forth in Appendix One a copy, for the convenience of the Court, for the sake of clarity, a copy of the bill, quoting the bill. In doing so, I subdivided, as I stated I would in my preliminary paragraphs where I referred to

this exhibit, I subdivided certain of the paragraphs into its natural parts, so it would be more easily read; and so that it would bring to the Court's attention the way that we construed the Act to read, and I do not know whether the Court has examined that Appendix One of our brief. It is just a short brief, your Honors.

Judge Murrah: Yes, I have it.

Mr. Hansen: I thought you might be looking for it; it had a little blue cover.

Judge Murrah: Yes, I have it.

Mr. Hansen: That appears after page 21. The brief has [fol. 373] just twenty-one pages, and after that I set forth as Appendix One the Act itself.

Judge Murrah: Now Mr. Attorney General, you can readily appreciate the importance of your construction of this Act, because the Court would certainly, I think the Court would be bound by the Attorney General's interpretation of this Act; don't think the Federal courts have any power in the absence of authoritative decisions to the contrary. Whatever interpretation you place upon this Act would be binding on this Court; certainly, if it wouldn't be absolutely binding, it would be too persuasive for us to take any other position, because this Court can readily say that that would, your interpretation of it, would be binding to the extent that it would be your duty to enforce the Act, and the Act, and the enforcement of the Act, based upon your interpretation, would be the incidence of the Act in a constitutional sense.

Mr. Hansen: I don't agree with that, your Honor, entirely. I don't think that my construction or our construction would be binding on the Court. I think that it would be a matter of considerable persuasiveness to the Court, as we are the ones that are charged with its enforcement, as [fol. 374] well as the various county attorneys are primarily charged with the enforcement, and I think, it would be our idea that it certainly should be carefully considered by the Court. I don't think it's binding upon the Court.

Judge Murrah: If not binding, certainly it would be so persuasive that we would be most reluctant to take another position.

Mr. Hansen: I'd be glad to state my views upon the matter here.

Judge Murrah: Have you stated them in this brief?

Mr. Hansen: Sir?

Judge Murrah: Have you stated 'hem in the brief?

Mr. Hansen: No, sir, they are not. The brief was very quickly prepared. As the Court may know, I have had a good deal of trouble lately with my own eyes. I can hardly read and I have difficulty reading what I have before me. However, I had an operation just a short time ago, and so I therefore have been more or less at a loss in preparing for this case, although I have done the best I could.

Judge Murrah: That's perfectly all right.

[fol. 375] Mr. Hansen: I will be perfectly willing to give the Court my idea of the meaning of this law for what it is worth.

I will say this, as brought about yesterday, that in our answer, that we have filed, in our paragraph 5 of our answer, that we, the defendants, admit the material allegations of the facts set forth in paragraph 8 of said complaint, but allege that the acts of Lee Optical, Carp and Douglas as set forth, violate not only the provisions of House Bill 953 but of Chapters 11 and 13 of the former law.

It was our thought in filing, we certainly admit all the allegations of fact that was the material part that we had in there. We said they were performing all those material acts. We could have stopped there, but we went a little further. We said those acts violated, we didn't mean to say that each and every act that they say they are doing would be in violation, but we are saying that their acts violated, at least certain of those acts violated the provisions of the Act.

[fol. 376] There was question as to what we meant by that. We said it violated it. We didn't mean to say that it violated each and every word they had said that they were doing, that that was a violation. That was not our intention, and it was our intention to clarify that in our oral argument and our statements. It was suggested to the Court that we prepare an amended answer to that paragraph 5, and again to the associated paragraph which is paragraph 8, and I have prepared one, hoping to take this up with counsel, my associate counsel here before the trial

proceeded, but since the Court has that impression, I am agreeable to filing it now.

Judge Murrah: You need not. You may consult counsel if you wish.

Mr. Hansen: But before I begin to make any statement as to it, here we come in in more detail as we consider these acts, which of these acts violate these laws and thereby in effect say that the things that we do not say violate it, do not violate it because we try to separate them.

If the Court please, I just feel if I am going to answer that question now and go into the matter at this time, that I should have a few minutes to consult with my associate counsel, consider their views, before I go further upon the matter.

Judge Murrah: I think the Court will be glad to give you [fol. 377] that time.

Mr. Hansen: If the Court please, to clarify the issue; we thought that we would file this as the testimony developed, but the Court wishes us to file it now and so we can narrow this issue down at this time, and if I have a little time to consult my associate counsel, I think we would be willing to file it now and then go into the matter.

Judge Murrah: Very well, we urge you to do that. How much time do you think——

Mr. Hansen: I should think ten minutes will be ample time.

Judge Murrah: We will give you fifteen.

(Whereupon a brief recess was taken, following which the proceedings continued with the same counsel present.)

After Recess.

Judge Murrah: Proceed.

Mr. Hansen: If the Court please, in order that our position may be clear as to what constitutes a violation of the law, of what section, especially as to Section 2 and Section 3.

Judge Murrah: Yes.

Mr. Hansen: I call the Court's attention to the thing and then if the Court could sort of find and follow as I read this section here——

[fol. 378] Judge Murrah: Be glad to.

Mr. Hansen: I think it will make it a little easier to explain our idea of its real meaning.

As Section 2 provides, "It shall be unlawful for any firm, corporation, company or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Session Laws 1951"—that is the medical practice act and the optometry act—here are the things that I have cited. I have indented these paragraphs starting out I thought with each one being more or less separate, a little easier to read in this way: "To fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person."

Then dropping down to the exception here, "except that persons licensed under the provisions of Chapters 11 or 13 * * * may in a written prescription or its duplicate authorize"—optical suppliers to do those things.

In other words, no one, the statute provides that no one but a licensed physician or an optometrist can do the acts mentioned in the first paragraph unless they do it upon the prescription supplied through an optical supplier to the optician.

Then it says, "To duplicate or attempt to duplicate, or to place or replace into the frames any lenses or other optical appliances which have been prescribed, fitted or adjusted [fol. 379] for visual correction, or which are intended to aid human vision."

No one under the statute except a licensed optometrist or a physician may do those acts, except—we come down again to that exception, that these persons who are so licensed may by written prescription authorize an optical supplier by written prescription or its duplicate, may authorize any optical supplier to interpret that said prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses or frames or eyeglasses and so forth. They may do those things pursuant to prescription.

We think that means this, that if an optometrist or ophthalmologist writes a prescription, he can authorize the optical supplier to follow that prescription, and in so far as that prescription gives measurements, it must be followed, those must be followed, must not be departed from: but if

in his prescription, which he has a right to do, if he leaves out things other optometrists or ophthalmologists might put in there that he does not put in there, why then he leaves up to the optician the doing of those things. In other words, pursuant to that prescription, in accordance with the prescription, and you must follow that prescription in so far as it goes, and it certainly must give the measurement of the lens itself, but if the prescription fails to give some definite data which he is willing to leave to [fol. 380] the optician to do for him, a man that he would trust and for which acts he is responsible under the law, he may do so. In other words, the prescription need not put everything in that one optometrist or one ophthalmologist might deem necessary and proper, but he has got to follow it in so far as it goes, and he must not do those things unless he has a prescription, and he must follow that prescription in so far as it goes; but if it requires him to go ahead and do things that the optical physician or ophthalmologist has left out and left to him to do, and for which the ophthalmologist in doing so makes himself responsible under the law, that is as far as the prescription needs to go, and that is our idea of that part. I think that he can do any of these things.

Judge Murrah: Can he do anything except that which is set forth?

Mr. Hansen: He must follow the prescription. He must not depart from the prescription, but things not covered by the prescription, why of course he can go ahead and do. That's why the Legislature made them responsible for the acts of the persons when they turned that over, if they didn't give sufficient definite instruction for him to do it and something wrong happened, if there is a liability which would arise under the statute, he would be responsible. He could have gone further; he didn't go further, but he must write [fol. 381] the prescription, it must have the measurement. The other things, we don't think it would be necessary. We think that is up to the physician or the optometrist. We do not think he needs to go further.

Judge Vaught: While we are on that, let me ask you this: Suppose that one should go in there and have a broken lens, is your interpretation to the effect that if that man

made the lens originally, or if he has a prescription in his own file in his office, that he can go ahead and make that correction?

Mr. Hansen: We think that if a man comes in with a broken lens, and presents that to an optician who does not have the original prescription, or a duplicate of the original prescription, that he cannot duplicate that upon his own responsibility.

Judge Murrah: By use of the lensometer?

Mr. Hansen: Yes, sir, by the lensometer.

Judge Vaught: I don't care to inject any new evidence, but two years ago, for instance, I was holding court in Enid. I dropped my glasses, broke a lens. I couldn't see. You know, if a judge can't see, he is as bad off as a lawyer that can't see. I went into an optician there, office there at Enid. I told him who had made my glasses, who the doctor was and who the optician was. He says, "You just leave them here." He called the optician and got the prescription. [fol. 382] Now would you say that that was a violation of the Act?

Mr. Hansen: I think that he would have to have the prescription or a duplicate of the prescription on file with him before he could do it, yes, sir. I doubt if a court, if he had—say it would be phoned to him or wired to him, I am doubting very much, I am quite sure the State would not think an act of that kind, where it was done upon the measurement of the optician or the optometrist, he has those—not just a mere question of duplication from the lens—if he has those; it says upon the written prescription or a duplicate, that's what ought to be done. I am rather sure we wouldn't be filing, we wouldn't encourage the filing of an of an action, but I think as far as the wording of the statute is concerned, getting the literal interpretation.

Judge Vaught: I was on a hunting trip a few years ago and down in a small town, and one of these little contraptions here that fits on my nose came off, and the sharp point made it very disagreeable to wear. Now I went into a little shop down there, I don't know whether he was an optician or ophthalmologst or what ever you would call him, but he said, "Yes, we have those", and he put one on in a few minutes. I went on my way. Now would you say that he had the right to do that?

Mr. Hansen: I say certainly the statute expressly — that [fol. 383] right, but the statute says here at the conclusion of Section 2, "provided, however, that this section shall not prevent a qualified person from making repairs to eyeglasses." So anything that comes within the purview of repairs, that is expressly excluded. He may do that, but it would not be, we do not think that it would constitute a repair coming in with a broken lens. You don't repair those lenses, you don't glue them together. He grinds new lenses, and to put them in a frame, adjust that frame upon the face of the customer, we say that he could not do that, but he could make any repair, anything which comes within the purview of repair, because it's expressly authorized by the Act.

Judge Vaught: What do you understand by "qualified person"?

Mr. Hansen: I think any person who purports and claims to be qualified. I think all the opticians would say they are qualified. I think other persons who may not hold themselves out to be opticians, I think you could go into a jewelry and anybody that would want to take on the duty of repairing those glasses, even though he wasn't an optician, I think he could do that. I think I could do it, even though I would charge compensation for it, because as long as the statute doesn't go ahead and prescribe what the qualifications are, of this repair are, I think we could assume that it would be——

[fol. 384] Judge Vaught: (Interposing) Do I understand your interpretation of this Act is that if the optician has a prescription that he can do any of the things mentioned in Section 2?

Mr. Hansen: Yes, sir, if he has a prescription or a duplicate of a prescription, and we also say that that prescription would not necessarily have to be addressed to him. It might be addressed to anyone, but he would have to have the prescription or a duplicate of the prescription, and that prescription should be followed by him in so far as the prescription gives directions, leaving to his discretion under this statute anything that would not be a departure from the prescription.

Judge Murrah: That also means that he could duplicate the glasses by the sale of another glass, with a different

frame, so long as he had the prescriptive authority on file?

Mr. Hansen: That's exactly correct, Judge. He can do just as much at that time as he did if he was the one to whom the prescription was originally presented.

Judge Murrah: But you deny that he could replace, refit, or readapt, adjust a glass from the use of the lensometer, by use of the lensometer?

Mr. Hansen: That alone, without a prescription.

[fol. 385] Judge Murrah: Without prescriptive authority. He cannot take the glass, the lens and duplicate it by the use of his lensometer as demonstrated here in court?

Mr. Hansen: Nor fit it upon the face of the customer. We say that is prohibited by this statute. We think that it was also prohibited by the old statute, although I want to make that clear: When that matter came up in our office and I cited here an opinion of the Attorney General, put it in my appendix in this brief, clearly stating in the language introducing that in the preliminary part, that we realize that it is not binding upon the Court, but persuasive to our view of the law before writing this new law, that a correct interpretation of the law prohibited that. The law did not expressly say so. The law, it's our interpretation, prohibited it but it's a matter of interpretation and with which interpretation a good many differed, whereas in this law, it has stopped arguments, and to make it clear they wrote in this law that which we said the prior law should be construed, if properly construed, to prevent; and here they expressly stated it.

Here, now, no one need say "Well, I did the act. I didn't know that it was unlawful." They might have said that before. I know we are all presumed to know the law, but the law doesn't specifically spell it out.

Judge Vaught: What is the controversy then between [fol. 386] the parties as to the Section 2, if you agree to those? What do you say now? You have heard his interpretation.

Mr. Woods: The controversy is in these respects, if your Honors please: First, as I understand what counsel has stated, a prescription such as Exhibit 21 in this case, which specifies only the power of the lenses, if it's given to the optician, permits him to do every one of the acts enumerated in Section 2.

All right now, the next thing I come to is this: As I understand his statement, I cannot go in to an optician and say, "I would like to buy these frames", and I would ask him to take the lenses out of my existing glasses and put them into these new glasses, purely the mechanical operation of taking those old lenses out and reinserting them in these new frames, unless I have this type of prescription here.

Now, we say that that function he is doing is mechanical, that it has absolutely no relation to any matter of public health or welfare, and that the effect of this statute in requiring that is to take away these opticians' business, a major portion of their business, which is the sale of frames, either for the insertion of your old lenses or for the insertion of new lenses duplicated by means of a lensometer for an extra pair of glasses; or in another instance, where I might break my frames, a zyl frame which is a plastic type [fol. 387] of frame, something like this, cannot be, if it's broken, there is no way it can be repaired; so it has to have either the old lenses if they are not broken, inserted in this frame, or new lenses if those are cracked or broken, ground, cut, edged and inserted in this frame.

Judge Vaught: What do you say on that point?

Mr. Hansen: I say that if I break my glasses, or take his glasses over there, if they are broken, and if they have to give me a new pair of frames and fit the lenses that I have in those frames and adjust those frames on my face, we are saying this law makes that unlawful. We are saying—we realize that that might be inconvenient to some people but lots of laws are inconvenient to people, we realize that that might cause them the loss of a certain income—but lots of our laws prevent people from earning as much as they did before, still they are proper laws.

That is a matter of argument, but the factual situation, we absolutely agree with counsel that such a matter would be, unless he had a prescription or a duplicate of a prescription, would be a violation of this law.

This person who has broken his lenses, broken a lens, I should say, that can't be duplicated and put in a frame. We say that if the lenses are not broken, and they want to get some new different frame or if the frames are broken and that frame can be repaired, of course it can be repaired

[fol. 388] because the statute expressly authorizes it, but if it requires not a repair of a frame but the replacement of a frame, giving a new frame, different style of frame, we are saying that under the law he has to have a prescription, but we say that all of those require, of course require the adjustment of that to the face, and we say that that is a violation of law, and we say that this law intended to make it clear, just as we say that under the former law, we quote on page 6 of our brief under the decision of the former law by the only case that's been tried in Oklahoma, District Court decision, but here's what Judge Ballaine under the Tulsa County case said. That's why we say it's not only a violation of the present law which is clearly spelled out, but under the former law as we interpret it, right or wrong, as we interpret it.

In this case Judge Ballaine, Tulsa County case involving Chapters 11 and 13, supra, I quote now from his decision, "The adjustment of lenses into frames and the adjustment of frames to the face, unless done upon the prescription of an authorized person which gives exact and specific measurements therefor, constitutes the 'correcting or relief of ocular abnormalities by the employment of any means', and constitutes the practice of optometry."

And then he enjoined these people, "from performing or aiding or abetting in the performance" of such an act, [fol. 389] and of course they violated that; they were cited for contempt. That's a different story, that's a different action.

Judge Murrah: Was that a case that arose under this law?

Mr. Hansen: That arose under the old law as we construed it. Now we have the thing spelled out in our law, and we think here we have an express authorization for prescriptions. We didn't have any express authorization for prescriptions at that time. In fact by implication, by a little interpretation or implication it would even prevent the optometrists from even giving a prescription. We didn't so hold, the court didn't so hold, but it had that idea; but under the new law we think it requires giving a prescription, and that prescription under the new law does not provide that specific instructions be given for all the details therein, but leaves that to the man who writes the prescription. They don't need to give all of those details therein,

and if they don't give them it leaves it up to the optician filling the prescription to do the best that he can, and they are responsible for it.

Judge Vaught: You are agreed on everything except this: That if there is to be a new lens, or if the lens are to be fitted into a new frame or a corrected frame of any kind, you contend that he can't do that unless he has an original prescription on file.

[fol. 390] Mr. Hansen: Yes, sir.

Judge Vaught: Or a duplicate. You contend that——?

Mr. Woods: That is unconstitutional.

Judge Murrah: Your issues are clearly defined. I don't think they could be more clearly defined. Now shall we pass—do you have anything further there?

Mr. Woods: If your Honors please, there is one further ramification or facet of this. For example, Judge Vaught's question was about the repairing of the pad, as I understand, which was broken on his eyeglass. Now when that is replaced in a great many instances, as the Court saw from the evidence and heard, that involves fitting, adjusting and adapting to the face those glasses in order to get them to set properly on the face of that person.

Now this statute prevents that unless there is a prescription.

Judge Vaught: What do you say to this last sentence, "provided that this section shall not prevent a qualified person from making repairs to eyeglasses." Now that would cover most any kind of repairs except as the Attorney General contends, the placing of either the lenses themselves into frames or making a new lens. That is the only distinction.

Judge Murrah: Mr. Attorney General, would you say that as an incident to permitted repair of eyeglasses the optician [fol. 391] could adjust and apply them to the face?

Mr. Hansen: Yes, sir; whether that is a wise law or not, I think that's what the Legislature said—"provided that this section shall not prevent the qualified person from making repairs to eyeglasses"; and as long as he is making a repair, as long as it comes under the purview of the word "repair", anything that would be incidental to that repair I think would be proper.

Judge Murrah: Does that include adjustment, if the optician placed a new, I believe they call it "eye pad"——

Mr. Woods: Correct, your Honor.

Judge Murrah (Continuing): —to the glass, then I suppose that it's contemplated that he would have to adjust that to fit the nose so that it would be comfortable?

Mr. Hansen: It might include that; I am not sure.

Judge Murrah: Do you concede that that would be a proper function incident to the proper repair?

Mr. Hansen: I would say just anything, he can repair the glasses, and of course that would mean, let's see—make a person a pair of glasses, the whole thing, and if it's a question of repair I think he can do it. However, I have here, it may not be very binding, I just brought here at——

Judge Murrah (Interposing): May I interrupt? He could adjust the repair?

[fol. 392] Mr. Hansen: Yes, sir, anything that he had to do to make the repair, workable repair, I think he could do.

Judge Murrah: I see.

Mr. Hansen: I have here the definition of the word "repair" from Webster's International. Of course we all know the meaning of it pretty well without quoting it, but it reads, "Repair: restoration after decay, waste, injury or partial destruction, supply of loss, reparation, as a repair of a building, often the plural, to make repairs * * *". In other words, if it comes within the general ordinary meaning of the word "repair", he could do it and anything that would be incidental to repairing that glass and to making it useful, after he has made the repair as long as it's limited to repair, I think he can do.

Judge Murrah: Repair or restore, if he can restore it, repair it, he could restore it to its original comfortable position on the face?

Mr. Hansen: I think, for instance, if a frame would be broken, say it was a wire frame, I think he could solder it together.

Judge Murrah: Well, suppose I break this, what do I want to say——

Mr. Woods: Temple piece.

Judge Murrah: Temple piece. Suppose I break the tem-

ple piece and I take it, could he replace the temple piece [fol. 393] and adjust it so that it would fit comfortably?

Mr. Hansen: I have doubt upon that; I have doubt upon that.

Judge Murrah: What would be the difference?

Mr. Hansen: Every little angle that comes up here, every particular thing that's going to be challenged, will have to stand upon its own bottom, and I wouldn't want to be saying as to what, and trying to enumerate here which comes under the word "repair", but I would say generally that as far as what the courts have interpreted the word "repair" to mean, and the courts would have to interpret that, he can do those things.

Judge Vaught: About the best definition of repair is "repair". You can't make it any clearer than that.

Mr. Hansen: There is another matter that's brought up here under Section 3. Of course, the Court read at the conclusion of Section 2, said "provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person." In other words the statute so recites. Now I come to Section 3, and therefore some connection on that, reads—I provided that again in my little memorandum if you follow me there.

Judge Murrah: Where is that?

Mr. Hansen: On page 2 on the appendix there.

[fol. 394] Judge Murrah: Yes, we have it.

Mr. Hansen: "It shall be unlawful for any person, firm, company, corporation or partnership", and I come to my subdivision there, just take the first thing, first paragraph, "To solicit the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms, or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory, display advertisement, or by any other means of advertisement."

That is the first thing—or "to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eyeglasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction."

Then it's got a proviso—those are the two things that are

prohibited, more or less the same thing, but related to each other.

> "Provided, however, that the provisions of this Act shall not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor of said commodity or material."

We can jump that and come down to the last paragraph, "Nor shall anything in this Act prevent ethical * * *", [fol. 395] we can jump that; then come down to the last paragraph, which I think needs a statement from us as to its meaning because there was a question in relation to this I think yesterday:

"Nothing in this Act"—I think this came on in an amendment to the Act—"Nothing in this Act", that is not important, "Nothing in this Act shall prohibit the sale of ready to wear glasses equipped with convex spherical lenses nor sunglasses equipped" and so forth, "when sold as merchandise at any established place of business and where the selection of the glasses is at the discretion of the purchaser."

We think the question arose, the question was asked if a person, a merchant downtown, is selling as merchandise this type of glasses here, which are nothing more or less than magnifying, or just for sunglass, would he be prevented from advertising those things. We don't think so. We think when they put the exception in this Act, and said that nothing in the Act will prohibit the sale of these glasses when sold as merchandise, just over the counter, sold in the manner provided there, that the Legislature intended to permit those sales to go on without any of the inhibitions of the Act.

Therefore if that merchant—we never have heard yet of a merchant advertising these things, it's not an evil that [fol. 396] will come up, it's never been brought to our attention—but if a merchant is advertising things his store of this particular type and in the particular manner, if he would advertise that he had some of these glasses for sale, we don't think there would be an inhibition by the Act.

It might have been better for the Act to so provide; we don't think it does so provide.

It is true that it only says here, "Nothing in this Act shall prohibit the sale of" these, and doesn't say the sale or advertisement, but we think that would be necessarily eliminated from the operation of the Act; nothing in the Act shall prohibit the sale, therefore nothing in the Act that would prohibit the advertising, because it would not be so called.

I wanted to bring that to the Court's attention so there wouldn't be any question as to that feature. I don't think it's involved in this case, because I don't believe these gentlemen here—but of course, this law is not just a law regulating these optical companies; this law relates to every optical company in the State of Oklahoma whether they have skilled opticians or unskilled opticians; and regardless of the manner, it applies to all. This action is not one just against these particular defend nts. This action is one for declaratory judgment as the whole law, and so what these particular people do is of no consequence to me, particular [fol. 397] consequence to me in the interpretation of this law, because it's got to apply—that's all our idea, more or less goes to the question of argument.

Judge Murrah: That is sufficient. Now Mr. Attorney General, would you be kind enough to have your remarks transcribed for the benefit of the Court?

Mr. Hansen: Were they taken down? We will be glad to.

Judge Murrah: You could easily uinderstand how they would be helpful.

Mr. Hansen: Yes, be very glad to order it.

Judge Murrah: Any other remarks?

Mr. Hansen: I was going also to say that the two paragraphs that the Court called to our attention here, that are possibly not as clear as they should be, and we will prepare and file before the conclusion of this case—I already have prepared in the rough and I want to take it up with co-counsel, they don't agree with everything I said—upon the wording, and we will try to bring these things out in that answer, as to the amendment of paragraph 5 and 8, as the Court suggested we should do yesterday, and I worked on it this morning.

Judge Murrah: Yes.

Judge Vaught: One other question.

Mr. Hansen: Yes, sir.

[fol. 398] Judge Vaught: Now you agree that an optician may furnish these glasses, and you have heard the testimony of one witness that it was necessary for them to have quite a supply of those frames on hand. Now would you say that this law prevents them from exhibiting those frames inside their building in any way they wanted to?

Mr. Hansen: Yes, sir, we—inside the building, no sir; window displays, now, not inside the building. We think that this law prohibits a thing that is often referred to as bait advertising, that is advertising over the radio or newspaper advertisements or window displays—some of them come out with big bay window displays where they have exaggerated windows so they can display, induce people to come into their place of business, and then when they get in there they find the sad news, "No, we can't sell you these things except upon a prescription." And of course they always suggest or could suggest or there is a possibility of suggesting—when we are talking about the constitutionality of the law we look at the evils that might flow from it, for these laws are held valid if they reach any lawful public purpose—and it has inducement for people to come into the place of business, look these things over; and they often have an arrangement with some physician, they may not, or may—some optometrist—if not an optometrist they do have with someone, and which almost makes the physician [fol. 399] or the optometrist, if they are in a smaller town, almost forced to come and get their business from the optical house, because the physician can't advertise but the optical supplier can.

Were this statute invalid, he can advertise if he wants to and he can get anybody coming in, he can corner the business to all intents and purposes, with such advertising, window displays and all these other things that have been prohibited here. It just gets an opening wedge for corporation practice.

Judge Murrah: But it does not prevent an optician from maintaining a showcase inside his place of business?

Mr. Hansen: Of course not, no, sir.

Judge Murrah: Where he exhibits.

Mr. Hansen: Of course not. That is not our view.

Judge Murrah: That is not the Attorney General's interpretation?

Mr. Hansen: That is not our interpretation.

Judge Murrah: Thank you.

Mr. Woods: I think counsel has given a very fair and complete statement. In view of what he has said and the issues, I would like to request permission to recall Mr. Hill for just two or three questions, going to this matter of frames.

[fol. 400] Judge Murrah: You may.

Mr. Woods: Thank you.

ALLEN D HILL, recalled by the plaintiffs for further examination, being of lawful age and having previously been sworn, resumed the stand and testified further as follows:

Redirect examination (Continued).

By Mr. Woods:

Q. You are the Mr. Hill who was sworn and testified yesterday?

A. Yes, sir.

Q. Mr. Hill, I ask you whether or not in the operation of your business you sell frames to customers.

A. Certainly. That constitutes the most profitable part of my business.

Q. Now do you sell those frames only to persons whose prescriptions you have filed in your store?

A. No, I sell them to anybody that wants to buy one from me; they may come in off the street, be referred by a friend, or any number of means of getting in there.

Q. Can you state approximately what portion of your business is represented by the sale of frames to persons coming in to your store without prescriptions?

A. I would say probably 25%.

Q. Yes, sir. And what portion of your business is repre-
[fol. 401] sented by, or what portion of your income is represented by the sale of frames to all classes of persons?

A. I would say probably between 60% and 70%.

Judge Murrah: Repeat that. I think that's very important. I understand.

Judge Vaught: 25%.

Judge Murrah: Where there is no prescription.

Judge Vaught: Where there is no prescription, but all told about 60% to 70%. That would include prescriptions?

Mr. Woods: The question, I will restate it.

Judge Murrah: I think I understand it, but you may do so if you wish.

Mr. Woods: The last answer of Mr. Hill was in response to my question relating to the sale of frames to persons both with prescriptions and without prescriptions.

The Witness: Yes, sir.

Mr. Woods: And the previous question was with reference only to those persons who purchased frames without prescriptions.

The Witness: That's correct.

Judge Murrah: You said that was about 70% of your business?

The Witness: Yes, sir.

Judge Vaught: 25% was without.

The Witness: I'm speaking of the profitable end of the [fol. 402] business.

Judge Murrah: Well, I don't know whether I understand what you mean or not. Judge Vaught understands it. I don't.

Mr. Woods: My question was what portion of his income from the operation of his business was represented by first the sale of frames to persons who did not have prescriptions on file with him, and what was your answer with respect to that?

The Witness: My point is that in the sale of lenses the profit is relatively small as compared to the profit contained in the sale of a frame. Therefore, from a net profit angle, the sale of a frame is very much more important from a commercial standpoint.

Judge Vaught: What was his answer to the question? I want to get Judge Murrah and myself straightened out, sir.

Mr. Woods: I want to get it straightened out, too, your Honor.

Judge Vaught: I understand this, let me state it: That from the sale of frames, the sale of frames to those not having prescriptions is about 25%.

The Witness: Yes, sir.

Judge Vaught: The sale of frames to all persons including those that have prescriptions and those who do not have, from 60% to 75%, the total.

[fol. 403] The Witness: Yes, sir, the total income, we'll say.

Judge Murrah: Total income from your business.

The Witness: Net; I'm speaking of net.

Judge Murrah: 75% is from the sale of frames?

The Witness: Yes, sir.

Judge Murrah: I see.

By Mr. Woods:

Q. Can you state whether your experience is typical of other opticians in this state, or is there a difference from yours in any way?

Mr. Daugherty: Object to that question, if the Court please, as being beyond the realm of this witness' knowledge, no basis laid for what other people.

Judge Vaught: Don't answer it unless you know.

Judge Murrah: Yes. You may answer if you know.

Mr. Woods: If you know you may answer.

The Witness: Know what, what is the question?

Judge Murrah: Is your business typical.

The Witness: Well, I should say that probably it's typical in some respects, but I would say that the smaller dispensers who have established more recently than I are even more dependent upon the sale of frames than I am. In other words, they are very much more dependent on the sale of frames and dispiay of frames than I am, because a lot [fol. 404] of my work is referral.

Judge Murrah: That's all right.

By Mr. Woods:

Q. You were speaking of frames without prescriptions?

A. Yes, sir.

Mr. Woods: That's all. You may inquire.

Mr. Daugherty: No questions.
Judge Murrah: Anything further?
Mr. Daugherty: No questions, your Honor.

(Witness withdraws)

Oran Rips, one of the plaintiffs, called as a witness on behalf of the plaintiffs, being of lawful age and having first been duly sworn, testified as follows:

Direct examination.

By Mr. Woods:

Q. Will you state your name, please, sir?
A. Oran Rips.
Q. And where do you live?
A. You mean now?
Q. Yes.
A. In Tulsa.
Q. Are you a licensed physician in the State of Oklahoma?
A. I am.
Q. Are you practicing as such?
[fol. 405] A. I am.
Q. And where is your office, sir?
A. At 301 South Main.
Q. Where?
A. 301 South Main.
Q. In what city, sir?
A. In Tulsa.
Q. You are one of the plaintiffs in this action?
A. I am.
Q. From whom do you rent office space?
A. I rent my office space from the Zale's Jewelry Company.

Judge Vaught: Speak out just a little louder.
The Witness: From the Zale's Jewelry Company.

By Mr. Woods:

Q. I hand you what is marked Plaintiffs' Exhibit 22, and I will ask you what that instrument is.

A. Well, this is the lease that was issued to me by the Zale's Jewelry Company.

Mr. Woods: Plaintiffs offer in evidence Exhibit 22.

Judge Murrah: You should have submitted that to him a long time ago.

Mr. Duvall: It was, your Honor, it was——

Mr. Woods: (Interposing) Exhibit to the complaint.

Mr. Duvall: Immediately after the lawsuit was filed.

[fol. 406] Mr. Hansen: We have seen it, your Honors.

Mr. Woods: An exhibit to the complaint, your Honor.

Judge Murrah: Any objection? Be admitted.

(Plaintiffs' Exhibit 22, being document "Lease Agreement", having previously been marked for identification, was received in evidence.)

By Mr. Woods:

Q. Dr. Rips, I hand you what is marked Plaintiffs' Exhibit 23, and I will ask you to state what that is, what that purports to be a copy of.

A. That is a copy of a cancellation of the lease.

Q. Did you receive the original of Plaintiffs' Exhibit 23?

A. I did.

Q. On or about the date that that exhibit bears?

A. Well, just around that time.

Mr. Woods: That is also a copy of the exhibit to the complaint.

Judge Murrah: It is admitted now.

(Plaintiffs' Exhibit 23, being letter dated September 1, 1953, to Dr. Oran Rips from Zale Jewelry Company, having previously been marked for identification, was received in evidence.)

By Mr. Woods:

Q. Doctor, I will ask you if you have any opinion or judgment as to the value of your leasehold interest from the Zale Jewelry Company, what it's worth to you?

A. Well, I consider it's worth to me $25,000.

[fol. 407] Mr. Woods: You may inquire.

Cross-examination

By Mr. Daugherty:

Q. Dr. Rips, how long have you lived in Oklahoma?
A. Well, I used to practice here before and I have been here since the 17th of June this time.
Q. 17th of June this year?
A. From—this year.
Q. Is the Douglas Optical Company also located in the Zale Jewelry Store?
A. They are.
Q. Who operates the Douglas Optical Company?
A. Well, I wouldn't know; I think it's the Lee Optical.
Q. Does Ellis Carp own the Douglas Optical Company?
A. Yes, sir.
Q. Have you ever worked for Ellis Carp?
A. I did.
Q. Where?
A. In Laredo, Texas and Corpus Christi.
Q. Did you work for him on a salary?
A. Yes.
Q. Did you work for him in the Zale's Jewelry Store?
A. Over here?
Q. No, sir, at Laredo and Corpus Christi.
A. No.
[fol. 408] Q. Where did you work for him in Laredo and Corpus Christi?
A. At the Lee Optical, Laredo.
Q. Where was that store located?
A. Well, they were located, I think on Hidalgo Street.
Q. How about Corpus Christi?
A. They are located in the Medical Professional Building.
Q. Did you ever work for Ellis Carp in a Zale's Jewelry Store in Texas?
A. No.
Q. Have you ever worked in the Zale's Jewelry Store any place besides Oklahoma City or Tulsa, rather?
A. No, sir.
Q. How long did you work for Ellis Carp?
A. About two years.

Q. Did you work for him on a salary?
A. Yes.
Q. What kind of work did you do for Ellis Carp?
A. I refracted.
Q. Did you refract patients that he would send to you?
A. I refracted patients that came to the establishment.
Q. What was the name of that establishment?
A. The Lee Optical Company at Laredo and the Pearl Optical Company at Corpus Christi.
Q. Now with reference to the time that you moved into the Zale's Jewelry Company in Tulsa, when did Ellis Carp [fol. 409] and Douglas Optical Company move into the Zale's Jewelry Store in Tulsa?

Mr. Woods: If you know.
The Witness: I don't know.

By Mr. Daugherty:

Q. Were they there when you came in?
A. They were.
Q. Do you know how long they had been there?
A. I don't know, definitely.
Q. You have no idea how long they had been there?
A. No, I haven't.

Judge Murrah: What was the question?
Mr. Daugherty: I asked him how long Douglas Optical Company had been in Zale's Jewelry when he opened his office there. You said you don't know.
The Witness: (Shakes head negatively)

By Mr. Daugherty:

Q. Who negotiated this lease with the Zale Jewelry Company for you?

Mr. Woods: Now just a minute. I object to that. There has been no testimony that anyone negotiated it for him.
Judge Murrah: He may answer.
The Witness: Well, I negotiated directly with the Zale's. [fol. 410] Judge Murrah: Beg pardon?
The Witness: I, directly with the Zale's.
Judge Vaught: You did it yourself?
The Witness: Yes.

By Mr. Daugherty:

Q. Where?

A. I negotiated it in Tulsa, through Tulsa office.

Q. How did you happen to come to Tulsa, Oklahoma and locate your office in Zale's Jewelry Store?

A. Well, I always wanted to come back to Tulsa, and I understood Mr. Carp—I was on vacation in California, I had an Oklahoma license, and Mr. Carp told me that the doctor over here died, and that they needed a doctor.

Judge Murrah: Zale's Jewelry Store needed a doctor?

The Witness: Yes. The doctor that was working there before I came died.

By Mr. Daugherty:

Q. Is that the reason you came to Zale Jewelry Company?

A. Yes.

Q. Now I believe you testified that you did refraction work on patients that came into the place of business known as Lee Optical Company?

A. Yes.

Q. Do you do refraction work in Zale's Jewelry at Tulsa [fol. 411] on patients that are referred to you by Douglas Optical Company?

A. I do.

Q. Does the Douglas Optical Company run advertisements in Tulsa?

A. They do.

Q. Do they do it now?

A. They do.

Q. Do those patients find their way to your refraction room?

A. Yes.

Q. Does Douglas Optical Company maintain a window display?

A. They do.

Q. In the Zale's Jewelry Company?

A. They do.

Q. What do they display in that window?

A. Frames, easy terms, something like that.

Q. Now is it your position that you and the Douglas

Optical Company have no working arrangement with reference to these refractions?

A. None whatsoever.

Q. Do you make a charge for your refraction?

A. I do.

Q. Now after you refract a patient, where do you send the patient?

A. Well, I generally give them a prescription. They can [fol. 412] go wherever they please, I tell them. Most of them go there, because they generally come from there.

Q. Do you ever tell them to go to the Douglas Optical Company with their prescription?

A. No.

Q. Beg pardon?

A. I don't instruct the patients to go anywhere. They can go where they please.

Q. Where do most of your patients come from?

A. Most of the patients come from Douglas Optical because I am handy there.

Mr. Daugherty: That's all.

Mr. Woods: That's all. Thank you, Doctor.

(Witness withdraws.)

Ellis Carp, one of the plaintiffs, being called as a witness on behalf of the plaintiffs, being of lawful age and having first been duly sworn, testified as follows:

Direct examination.

By Mr. Woods:

Q. Will you state your name, please?

A. Ellis Carp.

Q. Where do you live?

A. Dallas, Texas.

Q. Would you speak up so we can hear you?

[fol. 413] A. Yes, sir.

Q. What is your occupation?

A. I am an optometrist, licensed in the State of Texas.

Q. For how long have you been so licensed?

A. Approximately fourteen years.

Q. Are you licensed in any other state as such?
A. No, I am not.

Mr. Duvall: We can't hear you.
The Witness: I am sorry.

By Mr. Woods:

Q. Do you practice optometry in any place?
A. Other than Texas?
Q. No, I'm asking, do you practice optometry any place?
A. Yes, I practice optometry in Texas.
Q. In Texas; do you practice optometry in Oklahoma?
A. No, I do not.
Q. Are you the owner of the business known as Douglas Optical Company?
A. Yes, I am.
Q. Are you the sole owner of that?
A. Yes, sir.
Q. And does Douglas Optical Company have any business in the State of Oklahoma, do they have any business location in the State of Oklahoma?
A. Oh, yes; I'm sorry, I misunderstood you.
[fol. 414] Q. Where is that?
A. That's located at 301 South Main——

Judge Vaught: (Interposing) Speak out louder.
The Witness: 301 South Main Street in Tulsa, in the Zale Jewelry Company.

By Mr. Woods:

Q. What is the nature of the business of the Douglas Optical in Tulsa?
A. Dispensing optician.
Q. And you are one of the plaintiffs, as the individual owner of Douglas Optical in this suit?
A. That's correct.

Mr. Duvall: Talk louder.

Q. Do you have any connection with the plaintiff Lee Optical in this suit?

A. I'm sorry.

Q. Do you have any connection with the plaintiff, Lee Optical Company?

A. Yes. I'm the president of the corporation known as Lee Optical Company of Oklahoma.

Q. That is a corporation?

A. Yes, sir.

Q. Does it have any place of business in the State of Oklahoma?

A. Yes, it does.

[fol. 415] Q. Where is that, sir?

A. 30 North Robinson in Oklahoma City.

Q. And what is the nature of the business operated by Lee Optical at that place?

A. That of a dispensing optician.

Q. Now in connection with the operation of the Douglas Optical and Lee Optical in Oklahoma City, what portion of your total business is represented by the sale of frames to persons coming in to those places?

A. The sale of frames constitutes the biggest part of it, perhaps as high as 70% of the total volume of the business.

Q. Now can you tell me what portion of the 70% is represented by persons who come to your place of business and have no prescription?

A. I'd say approximately half, or even a slightly higher percentage than half.

Judge Vaught: Half?
The Witness: Half of it.
Mr. Woods: Of the 70%?
The Witness: 30-40%.

By Mr. Woods:

Q. When a person comes to your store and wants to purchase frames, can you state what is done with respect to his lenses for those frames?

A. Well, if the lenses are of similar shape to the frame [fol. 416] that they desire and the frame is available in that size, they are removed from their old frame and placed into their new frame. If they are of a different pattern or size, or cut, so that they couldn't be inserted in the frame of their

choice, the lenses are neutralized on the lensometer, and lenses of equivalent power are made and inserted in that new frame.

Q. Dr. Carp, do you have any opinion as to the amount you would be damaged if you could not sell frames without prescriptions in Tulsa, and could not either replace the patient's existing lens in that frame or duplicate the lenses?

A. I'm pretty sure I could figure it approximately.

Q. That's what I want, approximately.

A. Ca, I'd say perhaps in the neighborhood of $1,000, $1,200, just from the one item alone, a month.

Q. A month, $1,000 or $1,200 a month?

A. Yes, sir, based on the volume of business that is being done at this particular time.

Q. Now can you state, do you have any opinion about the damage to Lee Optical in Oklahoma City if it could not sell frames and place or replace lenses or duplicate lenses in those frames in Oklahoma City?

A. Well, it would be of a lesser amount. Our business is comparatively new in Oklahoma City. I'd say perhaps in [fol. 417] the neighborhood of $500.00 a month.

Q. That's your best opinion, that the damage would amount to approximately $500.00 a month in Lee Optical?

A. I think that would be pretty close.

Q. Is that based upon the business you are doing at the present time?

A. Yes, sir.

Q. Has your business been increasing since you have been in Oklahoma City?

A. Yes, it has.

Q. Now tell me this, do you—does Tulsa and does Lee Optical of Oklahoma City send prescriptions, I mean send eyeglasses formulated either pursuant to prescription or which contain duplicated lenses not formulated pursuant to prescription, to customers outside of the State of Oklahoma?

A. Yes, we do.

Q. You do that by mail?

A. Yes, sir.

Q. Do you also fill the prescriptions of ophthalmologists from out of the State of Oklahoma?

A. Yes, sir, most certainly do.

Q. And can you state, is there any special location or outside city from which you get prescriptions that you fill?

A. Well, the only one I can think of offhand, I happened to see a prescription yesterday from St. Paul, Minnesota, [fol. 418] I believe.

Q. Yes.

A. From an opthalmologist there, from an individual who resides there.

Q. How about any Texas cities, do you frequently get prescriptions from ophthalmologists in Texas cities that you fill in Tulsa or Oklahoma City?

A. I believe I saw one also from Dallas.

Mr. Woods: That's all. You may inquire.

Cross-examination

By Mr. Daugherty:

Q. Dr. Carp, I believe you said you are from Dallas?

A. That's correct.

Q. You are not a resident of Oklahoma?

A. No, sir.

Q. You are president of Lee Optical Company?

A. Yes, sir.

Q. Are you familiar with the operation of Lee Optical Company here in Oklahoma City, are you familiar with their operation?

A. Well, I guess perhaps not every little detail of it, but the overall picture. I haven't been in Oklahoma City for several——

Q. When did you open Lee Optical Company in Oklahoma City?

A. I believe it was opened in June of this year.

[fol. 419] Q. Had House Bill 953 passed the Legislature at that time?

A. Well, the lease was negotiated in May, the first of May; it had not been passed at that time.

Q. Was it pending in the Legislature at that time?

A. I believe so; I don't recall what the dates are on that.

Q. Had you or any of your agents followed that measure in the Legislature?

A. They may have.

Q. When was Lee Optical Company incorporated?

Mr. Woods: Your Honors please, the record itself I think is the best evidence of its incorporation.

Judge Murrah: It is.

Mr. Daugherty: I have a certified copy of the Articles of Incorporation.

Mr. Woods: When was it incorporated?

Mr. Daugherty: June the 24th, 1953. Any objection?

Mr. Woods: No objection.

Mr. Daugherty: I don't see any need for burdening the record with it.

Mr. Duvall: I don't see any need to introduce it.

By Mr. Daugherty:

Q. When did you say that you opened Lee Optical Company in Oklahoma City?

A. The office was opened in June in '53.

Q. Now do you own stores in the State of Texas?

[fol. 420] A. Yes, I do.

Q. And total stores, how many?

A. That's right.

Q. How many?

A. Well, I operate exclusive offices, I'd say, I believe it's seventeen.

Q. Seventeen exclusive?

A. Yes.

Q. How many non-exclusive do you operate?

A. Leased departments, I'd say approximately eighteen, I think offhand; approximately eighteen.

Q. Do you operate some of your stores in Zale Jewelry Company stores in the State of Texas?

A. Some of them.

Q. And some of them are not in Zale's Jewelry Stores?

A. That is correct.

Q. You employed your co-plaintiff, Dr. Rips, I believe, in the State of Texas?

A. In the State of Texas, yes.

Q. Salary?

A. That's correct.

Q. Did he fill prescriptions for you in Texas?

A. Yes, he did.
Q. Did you also——

Mr. Woods: Excuse me, what was that question again? [fol. 421] (Reporter reads the question.)
Mr. Daugherty: Strike that question because it's improper. I think we had a meeting of minds that it wasn't proper.

By Mr. Daugherty:

Q. Did he make eye examinations for you in the State of Texas?
A. Well, as an employee, yes, he did.
Q. Working on a salary?
A. Yes.
Q. Now did you also have a Dr. Joseph T. Conti working for you in the State of Texas?
A. That's correct.
Q. Did he work for you on a salary?
A. That's correct.
Q. What did he do?
A. Same type of work. We are engaged in the optical business.
Q. Where is he now engaged in business?
A. In Oklahoma City.
Q. Where in Oklahoma City?
A. I believe it's the American National Building.
Q. Is that the same building in which Lee Optical Company is located?
A. That's the same building; different locations, however.
[fol. 422] Q. He is on the third floor and you are on the ground floor?
A. I believe he's on the third floor.
Q. Now when did Dr. Joseph Conti open his office in the American National Building?
A. I don't have that date. I don't know when he opened.
Q. With reference to when you opened the Lee Optical, when did he open his office?
A. I believe it was perhaps near the same or about the same time.
Q. Just prior to the time he opened his office in the Amer-

ican National Building, was he working for you on a salary in Texas?

A. Yes, he was employed by me.

Q. Did he leave your employment in Texas immediately prior to coming to Oklahoma City and opening his office in the American National Building?

A. What do you mean "immediately prior"; if you mean the next day, no.

Q. Within a week or ten days?

A. Well, I don't think it was within a week or ten days.

Q. Well, approximateiy what period of time?

A. Perhaps a month or so. I don't know, several weeks.

Judge Murrah: Did he open his office contemporaneously with the place of business?

Mr. Daugherty: I think that's what he said.

[fol. 423] By Mr. Daugherty:

Q. Now do you advertise by newspaper now?

Judge Vaught: Just a minute. I misunderstood there. When did he move here with reference to the time that you opened this place of business?

The Witness: When did he move here? Well, I'd say he probably moved here within a few weeks of that time.

By Mr. Daugherty:

Q. Was his last salaried job with you before he opened his office?

A. As far as I know. I don't know what he did in the intervening period.

Q. Now does Lee Optical Company of Oklahoma City advertise in the newspaper?

A. You mean as of today, or yesterday?

Q. As of the past ten days, let's say.

A. Last ten days, yes.

Q. Do you advertise the sale of spectacles by newspaper?

A. Sale of eyeglasses, yes.

Q. Sale of eyeglasses?

A. Yes.

Q. Do you also advertise by radio?

A. Yes, I think so.

Q. Do you maintain a window display on the ground floor entrance of your Lee Optical Company in Oklahoma City?

[fol. 424] A. Yes, we do.

Q. Do these advertisements attract customers to your place of business in search of eyeglasses?

A. Well, that's, I certainly hope they do. That's the purpose in buying advertising.

Q. Do some of these customers come into your place of business without glasses and in need of eye examinations?

A. I would imagine there are perhaps some.

Q. Do you recommend that those customers go anywhere for an examination?

A. Yes, they may go anywhere they desire.

Q. If they have no place that they particularly desire to go, do you recommend anyone to them?

A. We have the page of the telephone directory, they can pick any one of those doctors. Dr. Conti is in the building, and knowing that he is capable and that his fees are, I believe, from what I have heard, a little bit lower, we do recommend that they may go there.

Q. Do you have any card with Dr. Conti's name on them in your Lee Optical Company store?

A. As far as I know, no.

Q. As far as you know, you don't have any?

A. No, they may write his name on there for the person if the person can't remember it and wanted to know who, or what, they may give them instructions; if they perhaps [fol. 425] want some other doctor, they would write it.

Q. Dr. Carp, is Dr. Conti an ophthalmologist?

A. Well, I really don't know.

Q. Is he an M. D.?

A. Dr. Conti is an osteopathic physician.

Q. Is Dr. Conti an M. D.?

Mr. Woods: He answered the question. He said he was an osteopathic physician.

By Mr. Daugherty:

Q. Is he an optometrist?

A. He is an osteopathic physician.

Q. Then I take it he is not an optometrist nor an ophthalmologist?

A. Well, now, I don't know whether he'd be an ophthalmologist or not. I know in the State of Texas, an osteopathic physician and a medical practitioner are synonymous, and they have the same license and same duties, privileges, and are called ophthalmologists.

Q. Let me ask you this question: Do you know whether or not Dr. Conti is licensed, first, licensed as an optometrist in the State of Oklahoma?

A. Optometrist, did you say optometrist?

Q. Yes.

A. I wouldn't know for certain. I don't think so.

Q. Do you know what he charges for an eye examination?

[fol. 426] A. I think I heard it's either $3.00 or $5.00.

Q. When he makes an eye examination for a patient, that is a customer that you have sent up to him, does he send that prescription down to you to be filled?

A. I don't believe so. I am sure he gives, I can't speak for him—I assume he follows the same practice as everyone else, gives them the prescription and they are free to take it wherever they want to.

Q. Most of those customers come back to your place of business for the filling of their prescription?

Mr. Woods: I object to that; if he has any knowledge.

Judge Murrah: Overruled.

The Witness: Beg pardon?

Judge Murrah: Answer the question.

The Witness: Do most of them come back?

Mr. Daugherty: (Nods affirmatively)

The Witness: Well, most of them, not all of them.

By Mr. Daugherty:

Q. Most of them do?

A. I believe so. I would say most of them.

Q. Does Dr. Conti make a fee for his charge separate from any fee that you make?

A. Does Dr. Conti receive a fee? He does, he makes his examination, his examination fee.

[fol. 427] Q. Do you have any agreement or any arrangement with him with respect to fees?

A. None whatsoever.

Q. Did you or any of your agents negotiate his lease in the American National Building at the same time you negotiated yours?

A. I did not.

Q. Did any of your agents?

A. No, none of my agents did.

Q. Do you do any of your own grinding in your Lee Optical Company in Oklahoma City?

A. No, not locally.

Q. Do you do any grinding in Douglas Optical in Tulsa?

A. No.

Q. Where do you get your grinding done?

A. Well, most of it is sent to Dallas. We sometimes have it ground locally, but we are able to get better service and better prices by sending it to Dallas.

Q. You send it to the DalTex Company in Dallas?

A. That's correct.

Q. Do you own that company?

A. I am a partner in that company.

Q. Now can you tell the Court what percentage of the prescriptions you fill at Lee Optical Company here in Oklahoma City are prescribed by Dr. Conti?

[fol. 428] A. I don't believe I could; I don't believe I could.

Q. Can you give us an estimate?

A. Well, I'm sure the biggest part of it, but just how many I don't know, as we get prescriptions from out of the state from other ophthalmologists, but just how many I couldn't say without closer examination. I could check back.

Q. Well, as a matter of fact, Dr. Carp, aren't practically all of your prescriptions received from Dr. Conti?

A. I'd say the majority of them.

Q. And do you and Dr. Conti share any of your supplies, such as receipt books?

A. To the best of my knowledge, I don't think so.

Q. Does he get his receipt books at the same place you get yours?

A. Well, I really don't know. Sometimes supply houses—we supply prescription pads, the same as drug stores

supply prescription pads for physicians. As a matter of fact, we send out our prescription books all over the state soliciting business from our DalTex, from the optical laboratory.

Mr. Daugherty: That's all.

Mr. Woods: No questions.

Judge Murrah: Just a moment. Now as I understand, you either own or are interested in eighteen optical supply houses?

The Witness: No, excuse me.

[fol. 429] Judge Murrah: Well, you own eighteen and you are interested—you own seventeen and you are interested in eighteen more?

The Witness: No, may I correct you? I don't own any optical supply houses. I am an optometrist in the State of Texas.

Judge Murrah: Well, you have eighteen——

The Witness: I have establishments. I am associated with that many optometrists as partners, or on an employee basis, in operating optometric offices, which are different from optical supply houses. There is only one optical supply house that I have an interest in, DalTex.

Judge Murrah: What is that?

The Witness: DalTex Optical. The others are optometric.

Judge Murrah: You own one optical supply house or are a partner in the business?

The Witness: Yes, sir.

Judge Murrah: You are interested in it?

The Witness: Yes, I'm a partner.

Judge Murrah: In Dallas.

The Witness: Yes, sir.

Judge Murrah: Then you have eighteen, I believe, optometric establishments?

The Witness: Establishments.

[fol. 430] Judge Murrah: In Texas and Oklahoma?

The Witness: No, Texas.

Judge Murrah: All right. There you maintain window displays in each of those places?

The Witness: Yes, sir.

Judge Murrah: On the outside?

The Witness: Yes, sir.

Judge Murrah: And you also advertise in the newspapers?

The Witness: Yes, sir.

Judge Murrah: And over the radio?

The Witness: Yes, sir.

Judge Murrah: And through other media of advertising, the sale of eyeglasses?

The Witness: That's right.

Judge Murrah: In the examination of eyes.

The Witness: In Texas, yes, sir.

Judge Murrah: Beg pardon?

The Witness: In Texas only.

Judge Murrah: In Texas?

The Witness: Yes, sir. We are permitted to do that in Texas.

Judge Murrah: In Oklahoma you own the Douglas Optical Company?

The Witness: That's correct.

[fol. 431] Judge Murrah: In Tulsa, and that is located in connection with the Zale's Jewelry Company?

The Witness: That's correct.

Judge Murrah: Now is that an optical supply or an optometric establishment?

The Witness: No, that's a dispensing optician.

Judge Murrah: Don't you know what it is?

The Witness: The dispensing optician is what we are limited to.

Judge Murrah: In Dallas you are dispensing optician, that is the Douglas Supply, Douglas Optical Company is dispensing optician or dispensing establishment?

The Witness: You are speaking——?

Judge Murrah: All right, you tell what it is.

The Witness: Douglas Optical is in Tulsa. DalTex is in Dallas. You said Douglas Optical in Dallas.

Judge Murrah: Douglas is in Zale's at Tulsa, Oklahoma?

The Witness: That's the dispensing optician.

Judge Murrah: All right. That is inside Zale's Jewelry Company?

The Witness: Yes, sir.

Judge Murrah: And you maintain window displays there?

The Witness: Yes, sir.

[fol. 432] Judge Murrah: You also advertise through Zale's Jewelry Company the sale of eyeglasses?

The Witness: No, it's not through Zale's Jewelry.

Judge Murrah: You advertise the sale of eyeglasses?

The Witness: Yes, Douglas Optical, yes, sir.

Judge Murrah: By radio, by newspaper and by other means of advertising?

The Witness: Yes, sir.

Judge Murrah: You also employed Doctor—what's his name, who just left the witness stand?

The Witness: I don't employ him.

Judge Murrah: He just works for you?

The Witness: No, sir. He collects his own fees and he pays his rent, he pays his own lease arrangement, and he keeps his own fees. I don't give him anything; he doesn't give me anything.

Judge Murrah: But you have an arrangement with him whereby you send all of your customers to him?

The Witness: We don't send them all. We may refer them, since he is there, the proximity being so close. If they don't care to go there they are free to go elsewhere.

Judge Murrah: The same building?

The Witness: Yes, sir.

Judge Murrah: The same space?

The Witness: Well, it's all inside Zale's Jewelry, yes [fol. 433] sir, it's adjoining.

Judge Murrah: But Doctor, what's his name?

The Witness: Rips.

Judge Murrah: But Dr. Rips has worked for you on a salary?

The Witness: In Texas.

Judge Murrah: In Texas?

The Witness: Yes, sir.

Judge Murrah: That is, he came from Texas to Oklahoma?

The Witness: That's right.

Judge Murrah: From your employ?

The Witness: He was in California at the time.

Judge Murrah: But he had been employed by you?

The Witness: Yes, sir, he had been, yes, sir.

Judge Murrah: But he is just, he is not employed on

a salary with you now, you merely have an arrangement with him whereby you refer your customers to him?

The Witness: That's right.

Judge Murrah: For refraction.

The Witness: That's right.

Judge Murrah: Then you hope that he will in turn, that they will return to the Douglas Optical Company for the prescription?

The Witness: That's correct.

[fol. 434] Judge Murrah: For the fulfillment of the prescription.

The Witness: Yes, sir.

Judge Murrah: Now then do you own the Lee Optical Company in Oklahoma City?

The Witness: (Nods affirmatively)

Judge Murrah: In the American National Building, and you maintain a window display there, you advertise in the papers, and you advertise the sale of eyeglasses over the radio and other means of advertising?

The Witness: Yes, sir.

Judge Murrah: You have a doctor, what's his name?

The Witness: Conti.

Judge Murrah: Who?

The Witness: Dr. Conti.

Judge Murrah: He came here about the time you opened your establishment there?

The Witness: Yes, sir.

Judge Murrah: He had been in you employ in Texas?

The Witness: Yes, sir.

Judge Murrah: He is not now in your employ?

The Witness: No, sir.

Judge Murrah: But he refers all of his—you refer all of your customers to him?

The Witness: We try.

The Witness: That's right.

Judge Murrah: That they will return to you for the fulfillment of their prescription?

The Witness: That's right.

Judge Murrah: And that's your general arrangement throughout your whole business, different establishments you have similar arrangements with other doctors?

The Witness: You mean in Oklahoma or Texas?

Judge Murrah: In Oklahoma and Texas.

The Witness: Well, I don't——

Judge Murrah: Do you own any other establishments in Oklahoma besides the Lee and the Douglas?

The Witness: No, sir, the point I'm trying to make, your Honor, if I may——

Judge Murrah: Well, I'm not trying to confuse you, but you seem confused about your own business.

The Witness: In Texas I can employ an optometrist or physician and they may work for me or either as partners or on a salary. In Oklahoma they do not work for me. They are in their own practice now. Now they had been employed. I knew them in Texas and they had worked for me in Texas, and it is obvious that I had advised them with opening here that it would be a good opportunity. However, that is as far as it goes. They are not obligated to me and I am not obligated to them.

[fol. 436] Judge Vaught: Do you have an agreement of any kind now that you will send these customers to the doctor and that he will have them bring their prescriptions back to you?

The Witness: There is no agreement other than at this particular moment it is to our mutual advantage. He seems capable enough. Usually when a person is satisfied with glasses they come back where they were dispensed, and he seems satisfied with our dispensing; if and when the time should arise that we, and we are getting patients from other ophthalmologists, as I say by being here and by people seeing our frames in the windows, they come in and bring us their prescriptions, so we are gradually building up a business independent of his, what he sends us. It is becoming a smaller and smaller part.

Judge Murrah: In other words, you have no written arrangement, but it works out about that you will exchange business interests, but it does work out that way?

The Witness: Yes, sir, as I said, it works out to our mutual advantage that way. However, there is no agreement.

Judge Murrah: You say that you know that the doctor down here in the American National Building, with whom

you have this arrangement, is competent; you send them [fol. 437] back to him because you know that he is competent, but you don't know whether he is an osteopath or an optometrist or an opthalmologist or an optician?

The Witness: No, he is——

Judge Murrah: (Interposing) Well, do you know what it is at all?

The Witness: Osteopathic physician.

Judge Murrah: That's all you know about him?

The Witness: Yes, sir.

Judge Murrah: That's all.

Judge Vaught: Does the osteopathic physician under the laws of Oklahoma have the same right to practice as an M. D.?

Mr. Hansen: Our office has gone into that a number of times, and we have held that under the law the only person who can practice optometry is a licensed optometrist or a physician and surgeon authorized by law to practice medicine and surgery in Oklahoma, and an osteopath is only authorized to practice osteopathy in Oklahoma, and he is not qualified and we have so held; not only is that true, but we filed an action in Chickasha against an osteopathic physician down there who was trying to practice optometry, and during the course of the action he came in and filed a disclaimer and said—we were seeking to enjoin him—and he said that he would cease to practice, since he had been [fol. 438] advised to do that by counsel, and so the court dismissed the case against him under his express promise in writing that he would cease to practice the optometry in Oklahoma. Our view is that an osteopath is not entitled under the laws of Oklahoma to practice optometry and we have so held in a number of opinions.

Judge Murrah: Proceed.

(Witness withdraws)

COLLOQUY

Mr. Woods: If the Court please, at this time I would like to offer in evidence Exhibits 2 through 12 inclusive, and 36. Those exhibits have been shown to counsel for the defendants. Exhibit 2 is a letter on the letterhead of the Oklahoma Optometric Association from Mr. W. S. Farmer.

an optometrist, and in the office of the Secretary and Treasurer.

The others follow the Court's suggestion, are excerpts from various publications of either the Journal of Optometry or their weekly, other publications of theirs or other pamphlets which are a codification of their articles, and Exhibits 11 and 12 are from the Review of Optometry, taken from the Optometry Journal. They have to do with the adjustment of rimless glasses.

Exhibit 10 is from the magazine "Guildcraft" which is an official journal of the optician's society. Counsel had an opportunity to examine these.

Judge Murrah: Do you have any objection?

[fol. 439] Mr. Daugherty: We have examined the exhibits, your Honors, and we do object to their introduction into evidence for the reason that they are incompetent, irrelevant and immaterial, and for the further reason that they constitute expressions and statements from people amounting to hearsay evidence, affording us no right to cross examination, that there is no reason as we view it for their introduction and we object to them.

Mr. Woods: If your Honors please, I am offering them for the purpose of having a bearing on the background on which this legislation was based, the so-called constitutional facts.

Judge Murrah: I don't want to admit something I just think is clearly erroneous, clearly hearsay. It just makes it more expensive. I don't think you could admit that anything here is material if it's perfectly hearsay now; if it's out of some journal or by an authority, a recognized accepted authority as such, of course that's admissible, I think, if there is serious question about it.

Mr. Woods: Well, your Honor——

Judge Murrah: (Interposing) But just a statement that someone makes here, that states an opinion without any right of cross examination—you know the right of cross examination is the test of trustworthiness.

Mr. Woods: Indeed it is.

[fol. 440] Judge Murrah: And usually that is the basis on which evidence of this kind is admissible, and only a finding or expression of opinion which is based upon evidence of

some kind, of course, that such and such an order, administrative order is a suitable order and such. Just stating my own views, my associates probably won't agree with me, but I don't see the purpose of admitting something that will encumber your record here with a matter that is purely hearsay.

Mr. Woods: If your Honor please, I will address myself first to Plaintiffs' Exhibit 2 which was offered which is a letter from W. S. Farmer, a doctor of optometry here in the State of Oklahoma, and which pertains directly to this legislation. Now I offer that separately at this time.

Judge Murrah: What is it about?

Mr. Woods: It advises that House Bill Number 953 has been introduced by them, if the Court please. It starts off——

Judge Murrah: (Interposing) That is the type of testimony we decided at the pretrial the other day we would exclude and told you so.

Mr. Woods: Your Honors, I am not attempting in any way to get around anything that was agreed upon at the pretrial conference, but it was my understanding that—— [fol. 441] Judge Murrah: (Interposing) Very well. Do my associates understand the nature of the exhibit?

Judge Wallace: You have a copy of it in your brief, don't you?

Mr. Woods: Yes, your Honor.

Judge Murrah: I don't hink it has any bearing at all on the case.

Mr. Woods: Then if the Court please, Exhibits 3 through 12 fall in the general category of articles which have been published in official journals or publications of the National Optometric Association, of which all optometrists, if they belong to the state association here, are members. I am offering those because they have a very direct bearing, in my opinion, upon the background upon which this legislation was based, and are pertinent because they are illustrative of the fact that the statute——

Judge Murrah: (Interposing) You may as well get Dr. Coston or any other witness that has appeared on the witness stand to write us a letter. What would be the difference?

Mr. Woods: Well, I think——

Judge Murrah: (Interposing) The nature of that testimony that you seek to introduce by document is no different than oral testimony that is adduced testifying to the effect of the law, its incidence upon the trade or the business, or [fol. 442] the profession, whatever the case may be.

Mr. Woods: If your Honor please, it's my theory that in a constitutional type case, you are faced, both the Court and counsel, with a situation that is rather removed and different from the ordinary type of litigation. We all know our life today and our legislation is far more complex than it used to be, and in order to understand the entire background, and I am forced to use that word, involved in the field of legislation and its effect, one cannot accomplish that by applying to the evidence the ordinary rules of evidence; I think, in other words, there is greater latitude on the Court's part.

Judge Murrah: Sure.

Mr. Woods: It's almost judicial notice, but it's even an extension of the doctrine of judicial notice, if the Court please.

Judge Murrah: But the rule of evidence with respect to opinion evidence is too well settled for you and I to argue about. I will be glad to confer. What do you think? (Addressing the other members of the Court)

Judge Vaught: Your sole purpose in that is to show that perhaps that optometrists are the father of this bill, that they pushed it through, is that what you are getting at?

Mr. Woods: It is not limited to that, your Honor. It is [fol. 443] that in part, and beyond that. It is to explain the effect this Act has, because as the evidence shows, for example, approximately 70% of the glasses dispensed are dispensed by optometrists. They don't issue prescriptions ordinarily except in a rare case; so the result of that and the effect of that statute is that it takes away from the opticians, throughout the state, as much as 70% or a large segment of their business, when it prohibits them from acting and performing the same functions as they have heretofore in selling frames and in putting either old lenses or

new lenses into them. That is the purpose, the other purpose for which I offer them.

Judge Murrah: I'm not going to admit them. If my associates say it's admissible, it would certainly be admitted, but I think that is clearly inadmissible for two reasons, first it's immaterial, second its purely hearsay, and inadmissible in that it denies the right of cross examination.

Judge Vaught: I doubt if under the condition of the record it's material. That's the main thing.

Mr. Woods: One last thing I want to address myself to, if the Court please. We on October the 15th served a request upon the defendants with respect to what one might term the legistative history of House Bill Number 953. It shows in its original form it is prepared by the Clerk from [fol. 444] the journal out in the Legislature and shows the various amendments that that law went through. It shows the companion bill which was introduced in the Senate and which was identical to House Bill Number 953. I offer this because I think that the bill, the many changes that they went through, has a bearing again upon the background facts involved in this lawsuit.

Judge Murrah: Any objection?

Mr. Hansen: No objection, your Honors. We agreed it might be done. We think its incompetent, and if not incompetent we think it's rather immaterial, but we have no objection.

Judge Murrah: Be admitted.

(Plaintiffs' Exhibit 24, being documents from Senate Journal re House Bill Number 953, having previously been marked for identification, was received in evidence.)

Mr. Hansen: In the briefs I prepared, counsel called attention to the fact that when I came to the bill in my appendix I quoted paragraph 6, I didn't quote paragraph 7, and I think that's rather material.

Judge Murrah: In the appendices?

Mr. Hansen: Appendix 1, I quote the bill, the one we had here, but I failed to quote the last paragraph which is paragraph 7, and I think it's rather pertinent for me to read it to the Court in view of the question you asked me

about osteopathic physicians awhile ago, and that last [fol. 445] paragraph reads as follows:

> "The provisions of Sections 1, 2, and 6 of this bill shall not extend, limit or affect the legal scope of persons licensed under the provisions of Chapter 14, Title 59, Oklahoma Session Laws, 1951."

That chapter is a, it's a chapter, law about osteopaths, and in other words in enacting this bill it was put in there, because so many osteopaths think and believe that they do have the right to practice optometry in the state. Our office has held that they do not. This bill is expressly related that only authorized physicians and optometrists to write prescriptions, which upon its face would have the effect of limiting it to those and to excluding osteopaths, so this paragraph is put on the bill for the purpose that, if under the law osteopaths were authorized to write these prescriptions this bill would not deprive them of the right. Our office held, of course, that they did not have the right, but if we are wrong in our opinion and they did have the right under the present law, this law should not be interpreted to deprive them of that right.

I should have copied that section. I failed to do so.

Judge Murrah: Thank you. Anything further?

Mr. Woods: That's our case, if the Court please.

Judge Murrah: What say the State?

[fol. 446] Mr. Daugherty: May I make one or two statements? I understand that the depositions of the witnesses in Chicago and Kansas City have been introduced in evidence.

Mr. Woods: That's my understanding, Mr. Daugherty.

Judge Murrah: I don't recall whether they have ever been formally introduced or not.

Mr. Woods: I think they were yesterday, but I shall re-offer at this time the originals of the depositions of Dr. Benedict, Dr. Braley, Dr. Cordes, Dr. Culler, Dr. Alson Emmons, and Dr. Sheard, all of which were taken in Chicago. Now in connection with Dr. Sheard's deposition, if the Court please, the clerk informs me that apparently the original has not yet returned.

Judge Murrah: That's all right.

Mr. Woods: I offer also the deposition of Dr. Albert Lemoine, Jr., taken in Kansas City last week, all of those men with the exception of Dr. Sheard being ophthalmologists; Dr. Sheard being a Doctor of Science and former head of the department of biophysics at Mayo.

Mr. Daugherty: We have no objection to the introduction of these depositions other than the blanket objection that [redacted] is considerable material in those depositions that is incompetent, irrelevant and immaterial to the issues of this case. It would be, I am sure, a burdensome task for us to go through by question and answer and by question [fol. 447] and answer interpose an objection. We do wish to point that fact out to the Court, leaving to the wisdom of the Court the consideration of any of this matter which we deem to be immaterial.

Judge Murrah: That is a very fine statement. The Court appreciates it. We realize that in order to pass upon the admissibility of each and every item, it would be necessary to read it, and we certainly like to avoid that. You may be assured that the Court will endeavor to study these depositions with the idea of considering all of that which is material within the rules and boundaries that we have tried to lay down here.

Mr. Daugherty: It was our thought that by doing that, your Honor, we could cut down on the length of the time.

Judge Murrah: It is commendable on your part, Counsel.

Mr. Daugherty: Do you rest?

Mr. Woods: We rest.

Mr. Daugherty: May we move the Court to enter an order to dismiss the complaint on the grounds and for the reason that the evidence of the plaintiffs fails to support a claim on which the relief sought can be granted.

Judge Murrah: I suppose we would want to take the whole case, wouldn't we?

[fol. 448] Judge Vaught: Yes.

Judge Murrah: Overruled. Well, it's a convenient time now. Gentlemen, how much time will the State require?

Mr. Daugherty: Your Honor, we have three witnesses here, and possibly we might reduce them to two. Other than that, I think only argument.

Judge Murrah: Can you finish this afternoon?

Mr. Daugherty: I feel that our testimony can be on this afternoon. The question of argument, of course, is up to the Court.

Judge Murrah: We will settle that after the case is in, yes, sir. At this time the Court will take a recess until 2:00 o'clock.

(Whereupon the noon recess was taken, the proceedings to reconvene at 2:00 p. m. this day, with the same counsel present.)

[fol. 449] Afternoon Session

October 27, 1953.

Judge Murrah: Proceed.

Richard A. Clay, called as a witness on behalf of the defendants, being of lawful age and having first been duly sworn, testified as follows:

Direct examination.

By Mr. Daugherty:

Q. State your name and profession.

A. Richard A. Clay, ophthalmologist.

Q. Where is your place of business, Doctor?

A. 416 Northwest 13th, Oklahoma City.

Q. Are you appearing pursuant to a subpoena that has been served on you?

A. Yes, I was subpoenaed.

Q. Would you state to the Court just briefly as possible your educational background and the societies that you belong to pertaining to your profession?

A. I have an M. D. degree from the University of Oklahoma School of Medicine; and I have an interneship, two terms as resident in ophthalmology at University Hospital; two years in the Armed Services, followed by a year at Cornell Medical Center in New York City in ophthalmology;

[fol. 450] belong to the State and American Academies of Ophthalmology and Otolaryngology, diplomate of the American Board of Ophthalmology, Fellow of the American College of Surgeons, state and national medical associations.

Q. Now you are in the practice of ophthalmology here in Oklahoma City?

A. Yes.

Q. How long have you been in that practice, Doctor?

A. Five years last June.

Q. Do you make eye examinations?

A. Yes, I do.

Q. Pursuant to those examinations, do you write a prescription for glasses?

A. Yes, I do.

Q. Tell the Court the best you can what you normally put in your prescription for glasses.

A. I put the strength of the sphere, the strength of the cylinder, axis of the cylinder if there is a cylinder in it; the strength of the additional correction for near, if there is a bifocal or trifocal, and at times other information is necessary, such as prism content, and the direction of the prism effect. At times it is also necessary to give other information regarding the distance of the lens from the eye, or decentration of the lens if we are trying to get a special effect from the lens.

[fol. 451] Q. Is it true that what goes into the prescription will vary with the patient in his particular case?

A. Yes.

Q. After you make an examination, Doctor, and reduce your findings to a prescription, what do you do with the prescription?

A. I give the prescription to the patient to take to a dispensing optician.

Q. Do you use a dispensing optician in your practice?

A. I have no dispensing optician associated with me. The patient is free to take the prescription where he will.

Q. And do you use dispensing opticians then in the community in connection with your practice?

A. Yes, they are very much an important part of my business.

Q. Will you please state what your usual procedure is in

seeing that your patients take your prescription to an optician?

A. Well, I usually inquire as to whether or not the patient knows of a capable optician. Many of my patients have been to local opticians before, and they will say "I know of someone", and so I give them the sign that I think that's a fine place to go, if that's their desire, and they take it there. Occasionally a patient will tell me that they don't know of anyone in town, and I usually suggest one of three or four or five, usually give them a list of them. The [fol. 452] procedure after that is to have the patient come back to the office for a checking of the final glasses to be sure that the correction is as I ordered, and to be sure that the patient is comfortable with it.

Q. Do you make that check yourself when the patient comes back to your office?

A. Yes.

Q. Do you follow that procedure in every case, Doctor?

A. Occasionally it will vary. Some patient will come in and I am very busy or out of the office and we will have the technician, whom I have trained to do that, to check the glasses according to my finding on the examination, and as recorded on the chart, and then if there is any question at all about the comfort of the patient later, they are free to come back for recheck at my hands, or a complete reexamination if I find that is necessary.

Q. In your experience, do you find an occasional error in the work of the optician in attempting to fill your prescription?

A. Yes, I do.

Q. What do you do when you find such an error?

A. I call the optician and call his attention to the error, and they are very courteous about correcting the error.

Q. Is there any other reason why you might have your patients return to you with the glasses from the optician? [fol. 453] A. None except to satisfy myself that the patient is getting courteous and proper care, and that the patient is getting reasonable service, aside from the correction test and accuracy of the glasses.

Q. When the patient comes to you with defective vision and you undertake to take care of his vision, do you feel

that a professional confidential relationship is created when you undertake to handle that patient's eye troubles?

A. Yes.

Q. You feel you are responsible for that?

A. Yes.

Q. For that care when you undertake to do that?

A. Yes.

Q. Do you feel you hold anyone else responsible for it?

A. No one else except those who are responsible both to me and the patient; the optician is responsible to me and to the patient, but it's my duty to see that the optician's work is accurate.

Q. Do you feel that the professional man should remain responsible for the full effect of any appliances which might be furnished to the patient for the correction of his defective vision?

A. Yes, I do.

Q. Do you believe in that rule and principle, do you?

A. Yes, I do.

[fol. 454] Q. Doctor, in your opinion, are any persons in Oklahoma qualified to make an eye examination other than ophthalmologists or a physician or an optometrist?

A. No.

Q. Do you believe that it's in the public interest and public health and public welfare for unqualified persons to make eye examinations or correct the vision of another?

A. No, I do not.

Q. If I have no glasses and have defective vision and feel that I need glasses, where do you think I should start out in order to get eye care?

A. Well, you would have to start in the office of a doctor who is licensed to examine eyes and prescribe for your trouble.

Q. Do you feel that I should start out in search of eye examination and eye care in the establishment of an optician?

A. No. Occasionally that happens, but as a rule if you have no glasses, you are of course promptly told that nothing could be done for you at that point.

Q. Is the optician qualified to make an eye examination?

A. No.

Q. Are you familiar with this bill that is in controversy in this litigation?

A. Yes, I have read it and I am familiar with it as a lay person can be familiar with a bill of that sort.

[fol. 455] Q. Do you feel that the optician in supplying me with glasses, let's say an initial set of glasses, and fitting them to my face, should do that pursuant to written prescription of either an ophthalmologist or an optometrist?

A. Yes.

Q. Do you feel that is in the public health and public interest that that practice should prevail in Oklahoma?

A. Yes.

Q. Do you feel that the examination of eyes should be handled professionally rather than commercially?

A. Do you mean——

Q. Refraction of eyes for glasses should be handled professionally or should be handled commercially?

A. Well, I don't think that a doctor's services should ever be on a commercial basis.

Q. Do you state then to the Court that an eye examination or a refraction for glasses should be done on a professional basis and not a commercial basis?

A. That's right, I don't think that——

Judge Murrah: He has already answered that question two or three different ways.

By Mr. Daugherty:

Q. Would you state why you feel that way, Doctor?

A. Well, it's against the principles of ethics in my opinion, and the opinion of ages of doctors in the past, that [fol. 456] no doctor should work or should hire himself out to a lay person who makes a profit on his services, because you lose the contact with the patient and the direct patient-doctor relationship that is very important to good health, good care.

Q. In the viewpoint of the patient, or the public which represents the patient, would that be beneficial to the public?

A. Well, if I, for instance, agreed to perform cataract surgery on patients for a layman for a fixed fee per patient

or for a salary, I might be inclined to do cataracts that I wouldn't otherwise do, because I have to keep my job or because my employer tells me to.

Q. Do you sometimes make eye examinations and not prescribe glasses?

A. Very frequently.

Q. How often will that happen in your practice?

A. I would say that I see someone almost every day who either does not need glasses or does not need a change from his present glasses.

Q. Do those patients come to you for glasses if you should prescribe them or change them?

A. My patients would be happy to accept my service and the glasses if I advise them.

Q. Doctor, will you state your opinion as to whether or [fol. 457] not you think the solicitation of the sale of eyeglasses should be permitted by anybody through the mediums of advertising?

A. No, I do not.

Q. Why?

A. Because if we advertise glasses as having the best prices or the easiest to obtain or the best location, or any other of the forms of advertising to entice people to come in, it immediately leads to the practice of substituting inferior materials in order to meet price competition. For example, a batch of glass starting at the factory may be a very large vat of glass, but the finished product may actually contain only about 12% of that glass, or 10 or 12%, we'll say, in finished grade one lenses, but all along the line there are culls. They have ripples or imperfections or waves that are actually not grade one glasses, but those glasses can be bought very cheaply because they are separated as not perfect, and if we have a price advertising campaign, then it's very easy to meet that price competition by substituting inferior glasses and the patient suffers and the patient is not trained to detect the difference.

Q. Getting back to the law now, do you believe it's in the public interest for this law to prohibit rebates from opticians to optometrists or ophthalmologists?

A. Yes, I do.

Judge Vaught: I didn't get that question.

[fol. 458] By Mr. Daugherty:

Q. Do you feel it's in the public interest for this law to prohibit an optician from making or paying a rebate to an ophthalmologist or an optometrist?

A. Yes, I do, and that's been taken care of previously also in a Federal injunction, I believe.

Q. Do you feel that a professional man, namely an ophthalmologist or an optometrist, should permit an optician to solicit business for him?

A. Well, I would make a distinction there between soliciting, that is going out after the business, and a bona fide referral because he thought the doctor happened to be a good doctor, because I think that——

Q. (Interposing) I have reference to that solicitation you mentioned of going out after them.

A. Well——

Q. (Interposing) Is that good for the public interest?

A. Well, I don't want anyone to hunt business for me or pass out my cards on the street corner.

Q. Doctor, if glasses are improperly fitted or adjusted or applied to the face of the patient, is that patient likely to suffer some discomfort?

A. Well, that's quite possible. It would depend a great deal on the correction in the glasses.

Q. In your opinion, will ill fitted glasses reduce the [fol. 459] efficiency of the patient?

A. They may, and in a great many respects: for example, this pair of glasses that I have on could be improperly centered by quite a little bit, because one lens is perfectly plain, my right eye being normal, and the left lens has quite a little correction for nearsighted astigmatism. Decentering the lenses one way or the other a few millimeters wouldn't cause me any trouble, but there are patients who have quite strong corrections, and a few millimeters of decentering of lenses in or out, up or down, will cause a prism effect to be in that glass, which will make the patient uncomfortable or inefficient in his visual accomplishment, and it may interfere with his productivity and his discomfort may cause him to have headache or other discomfort.

Q. Will ill fitting glasses produce any physical damage to the eyeball?

A. I don't think that there has ever been anything to show that glasses that are poorly fitted, certainly within reason, can cause any structural damage to the nerve, the retina, or the lens of the eye, the actual mechanism of seeing. There is some possibility that they might cause muscular imbalance, which had been latent or unnoticed, to become manifest, become exhibited, so that the patient might actually have a tendency for the eyes to deviate out or in or up or down, by the glasses being poorly fitted.

[fol. 460] Q. Then as I understand it, ill fitting glasses can bring about a muscular imbalance?

A. Aside from the discomfort of the patient and lowered visual efficiency, they might also cause muscular imbalance.

Q. Now what would muscular imbalance require in the way of correction, if anything, if the patient wore those glasses for a period of time?

A. Within any reasonable length of time, I expect if the error was not very great, it would be entirely reversible if you take the glasses off and put the correct glasses on; it would be entirely reversible.

Q. What if that is not done over a period of weeks or months?

A. That would have to be qualified quite a little bit. If the variation is great, or if the glasses were worn for a great length of time, or for some months or years, then there might be a permanent muscular imbalance, a tendency for the eyes to deviate that is not constant.

Q. What about the aggravation of a nervous condition or in fact the bringing about of a nervous condition in the patient?

A. Well, improperly fitted glasses certainly can add to the nervous tension of a patient or cause a person to be nervous, can cause headache.

Q. Doctor, when a patient comes to you for an eye exam-
[fol. 461] ination, or that patient comes to an optometrist for an eye examination, is an examination made to see whether or not there are any pathological conditions in that eye?

A. Well, that's a very important part of my examination, and I understand the examination of the optometrists, too, to determine whether or not there is any disease that might influence vision, in addition to the fitting of the glasses.

Q. Are you familiar with the field and general method of operation of optometrists?

A. Yes, I am. My father and brother are optometrists.

Q. Durant, Oklahoma?

A. Yes.

Q. Doctor, in your opinion, if I should require a duplication of my glasses, would it be preferable that they be duplicated from your prescription, assuming that you prescribed my glasses—which you did not—or would it be preferable to have them duplicated by the use of a lensometer?

A. I think in all cases it would be preferable to do it from the prescription which has been written.

Q. Tell the Court why, please.

A. Because in that case there would be no doubt as to what the doctor had intended for you to have in front of your face. It's possible that a prescription might be made for you from the doctor's examination, the glasses filled, and because of a little faultiness in measuring or defect [fol. 462] in properly fitting the glasses which might not have been rechecked by the doctor or might not have been picked up, that your glasses were improperly fitted at the time, and the next time the glasses are made from that pair with a lensometer, the optician would have no way of knowing whether the decentering of the lenses up or down in or out, were intentional on the part of the doctor, or accidental because of sloppy dispensing, so I think it would be preferable to do it from the prescription.

Q. In the interest of public vision throughout the state, would that result in better eye care, in your opinion?

A. I think it would.

Q. Is it so that these lensometers and vertometers sometimes come out of manipulation or out of adjustment?

A. Oh, I think within certain limits, I think probably they do, but they are usually easy to put back in adjustment, and they are usually checked on frequent occasions. I have had my lensometer checked occasionally to be sure it is accurate, and I am sure that others do, too.

Q. But they can come out of adjustment?

A. That's right.

Q. Is the skill of the operator a factor in getting a correct reading on a lensometer?

A. Well, not that it takes any special education or educational background to do it, but it is a mechanical per-
[fol. 463] formance that can be taught, and naturally some people can do it better than others; the skill of the operator is a factor.

Q. Is it so, or not, that an operator might become rusty by laying off of the use of the lensometer, if you know?

A. I doubt that that would be an important factor.

Q. Is the element of human error present in the use of the lensometer in reading a lens?

A. Yes.

Q. Do you know whether or not it is the practice of the optician, if he does not do his own grinding, when he attempts to duplicate a lens by lensometer, that he writes down the prescription he finds from that reading?

A. I do not know.

Q. Is it possible for a lens in a pair of glasses to rotate inside of the frame?

A. Yes, in most frames that is possible.

Q. If the lens rotates——

Judge Vaught: (Interposing) What do you mean by that, Doctor?

The Witness: There are some types of frames that because of their shape the lens cannot rotate, your Honor.

Judge Vaught: Do you mean in the frame, rotate, change position in the frame?

The Witness: In the lens, in rotation or direction.

Judge Vaught: That's a movement of the lens within the
[fol. 464] frame?

The Witness: In the frame, yes, sir. That was a very important factor when there were round lenses, and is a little less important now, but still occurs with the newer shapes.

By Mr. Daugherty:

Q. How about this so-called "brow" type, does it tend to rotate in the frames any?

A. Not nearly as badly as the more nearly round, but it can rotate in the frame, especially if the screw gets loose.

Q. Now if a lens should rotate in a frame, and an attempt

was made to duplicate that lens on the lensometer, would that reading be, with reference to the axis, the optical center, that as shown on the lens in its rotated position rather than its prescribed position?

A. That's right.

Q. If that lens then duplicated, it would not be duplicated in accordance with the doctor's prescription?

A. That's right.

Q. If a pair of glasses are duplicated without the prescription, is it normally necessary for those glasses to be fitted and adjusted and adapted to the face by the person making the duplication?

A. You mean if you take a complete pair of glasses, make a duplicate pair; then the new pair does have to be adjusted [fol. 465] to the face, otherwise the patient cannot wear them.

Q. Do some of your prescriptions contain information that pertains to the proper fitting, adapting and adjusting of glasses to the patient's face?

A. Only if they vary from the accepted routine that is usually used in fitting.

Q. Some of your prescriptions will contain that type of data?

A. That's right.

Q. Normally, can that type of data be picked up by the pair of glasses themselves in the absence of the prescription in hand?

A. Usually the type that I put on the prescription cannot. For instance, the distance between the eye of the patient and the lens as it was fitted in the office. That does not mean that the distance from the eye to the lens is necessarily the same that the patient will wear them, but there are standard tables for computing from the figures which I give to properly place the lens in front of the eye. Another thing which I mentioned briefly a moment ago, if I purposely decenter a lens, say five millimeters, to get a prism effect because the patient has a weak muscle from trauma, or weak muscle from any cause, the lenses might be put on the lensometer, measurement made, and the optician has no way of knowing whether the decentration was intentional or accidental.

[fol. 466] Q. Would he then have to resort to guesswork in order to write his prescription on that lensometer reading?

A. Most likely he would make the lens exactly as it was in the frame, unless he felt that he was qualified to move the thing of his own volition, in which case he would be prescribing actually a new lens.

Q. Doctor, do you insist in your practice that the glasses fitted to the patient's face comply with your prescriptive result?

A. Within the limits of tolerance.

Q. Do you go by whether it is comfortable for the patient or not, or do you go by your prescriptive result?

A. Within reason I go by my prescription, because the patient may adapt to a pair of glasses that are not actually exactly the best for him, and after he has worn those for awhile, he might actually become perfectly comfortable with those and like them better than if they were changed a little bit.

Q. Doctor, are there any dangers of getting incorrect prescriptive result by taking lenses out of one set of frames and putting them in another?

A. Well, by far the majority of lenses could easily be taken from a frame such as I have and such as most people wear and put in another frame of similar shape and size, without any deleterious effect.

[fol. 467] Q. Will there be some cases where there might be a deleterious effect?

Mr. Duvall: Objected to as leading and suggestive, repetitious.

Judge Murrah: It is.

By Mr. Daugherty:

Q. Are there cases where there might be a deleterious effect in taking the lens out from one pair of glasses and putting them in another?

A. Yes, there might be occasions where a lens, especially a strong lens, might be setting at a given distance from the patient's eyes in the worn and loose frame, but in a new frame would have to be placed at a different distance. That

would be especially true in a cataract lens. For instance, the patient might wear the glasses two or three millimeters farther from his eyes with the old worn frame than with a new unworn frame. The difference of two or three millimeters in a lens of that strength could make a difference in the visual comfort and efficiency of the patient, because the lenses are very strong.

Q. Would the same deleterious effects result if the lens had rotated in the frame of the old glasses, should they be placed in new glasses in the rotated position?

A. It would depend on the strength of the lens.

Q. When is it worse than at other times, what type of lens?

[fol. 468] A. Well, if you take a lens with a very strong correction for astigmatism, rotate it in the frame several degrees, it makes a great deal of difference; whereas a very minor correction for astigmatism might not cause any discomfort at all, or any difference in vision.

Mr. Daugherty: Thank you very much. You may cross examine.

Cross-examination

By Mr. Woods:

Q. Doctor, I believe you said that in some cases when you wrote a prescription you would include directions as to the decentration?

A. That's right.

Q. Now in those cases your dispensing optician would make the measurment of the interpupillary distance, I presumme?

A. That's right.

Q. And then would move the axis away from the pupil of the particular eye where you wanted the lens decentered?

A. That's right.

Q. The optician would do that himself?

A. That's right, according to the instructions on the prescription.

Q. Yes. In your opinion, is the dispensing optician you use perfectly competent to determine the interpupillary distance?

[fol. 469] A. That's right.

Q. And they are competent to formulate the eyeglasses you prescribe from the lens blanks they have and the frames they have?

A. That's true.

Q. And they are competent to fit and adjust and adapt those eyeglasses to the face of that person?

A. Yes, that's right.

Q. And you depend upon them to do that?

A. I do.

Q. That's not a part of your practice, is it?

A. No.

Q. Now with respect to the lensometer, did I understand you to testify that you have trained your technician in your office to use the lensometer?

A. Yes, sir.

Q. And in some instances, that technician will check the glasses coming back to see that the prescription the optician has placed in there corresponds to the prescription you have prescribed, the lens you have prescribed?

A. And have on my office record.

Q. And you consider the technician employed by you as perfectly competent and able to do that work, of course?

A. Yes, and I stated that that was subject to my further check if I think there is any reason to do so.

[fol. 470] Q. Now Doctor, in the duplication of a lens by the lensometer, the person using the lensometer would go through the self-same acts that your technician goes through in checking the lens?

A. That's right.

Q. Would he not?

A. That's right.

Q. And of course, there is always the element of human error in everything?

A. That's right.

Q. In operating a lensometer or you in refracting an eye?

A. That's right.

Q. Or anything a person does?

A. That's right.

Q. Now if a person has a pair of eyeglasses prescribed by you, and they have been perfectly comfortable, they are

satisfied with them, if a lens were duplicated for those eyeglasses by the use of a lensometer, and it was the correct duplication, the person would have in effect the same eyeglasses he had been wearing before, would he not?

A. That's right.

Q. I believe you mentioned something about muscular imbalance. Have you in your practice ever encountered a case where an error in the eyeglasses worn by a person has aggravated or caused damage to a muscular condition?

[fol. 471] A. Yes, I have.

Q. How many such cases have you encountered?

A. I have seen a number of cases in which a child with a tendency for the eyes to turn in, or a tendency for the eyes to turn out, might have a deleterious effect by the prescription of farsighted glasses or nearsighted glasses, or proper or improper centration of the lenses.

Q. And you are speaking, are you, of a case where that child, for example, had a myopic condition and they had farsighted glasses?

A. No, not that the patient had a farsighted condition and had myopic glasses, but that we know there is a definite visual relation between a tendency for the eye to turn in and farsightedness.

Q. I see.

A. If that child is nearsighted, it has a tendency for the eyes to turn in, then we may elect to leave the glasses off, because it will have the opposite effect on the muscular imbalance.

Q. I see.

A. The same is true of the tendency for the eyes to turn out, which is usually associated with nearsightedness. We would not want that child to have a correction for farsightedness; it might aggravate the condition.

Q. Yes, but where you would take those glasses off, there [fol. 472] would be no permanent damage to the muscular condition of that child?

A. It would depend a great deal on the degree of deviation, the strength of the lens, how long he had worn them. For the most part, I'd say that there wouldn't be.

Q. That there would be no permanent damage?

A. There wouldn't be, but there might be instances where there would be.

Q. Now the fitting and adjusting and adapting to the face that Mr. Daugherty asked you about, in the case of a duplication, is the same fitting and adjusting and adapting that an optician would have to perform if a frame had been damaged in some way and he had realigned it and put it on the patient, is it not?

A. That's right.

Q. I believe you testified that improperly formulated lenses might have the tendency to make a person uncomfortable or I believe nervous, is that true?

A. That's right.

Q. Doctor, is not that the same type of nervousness that a person might have from an improperly fitted pair of shoes?

A. Well, it may be, yes.

Q. And Doctor, as a matter of fact, if you had a patient who came to you and said that his or her glasses were making him nervous, would you not have a suspicion that [fol. 473] there was some cause for that nervousness far beyond the glasses, and that the glasses were just a symptom of that, would that not be possible?

A. But this is not a patient that has come to me; this is a patient who has gotten his glasses directly from the optician.

Q. Well, either instance, where he has gotten them directly from the optician or where he comes to you and says that his glasses make him nervous, would you not immediately suspicion that there perhaps was some other involvement that was causing that nervousness rather than just a pair of glasses?

A. Yes, and I would check the glasses to see if they were accurate because I wouldn't want to add to that.

Q. Of course.

A. That's right.

Q. Doctor, in your opinion, should your patients come to you for a prescription before they purchase a new pair of frames for their existing lenses?

A. In those cases, no.

Mr. Woods: That's all, thank you.

Judge Murrah: Doctor, did I understand you to testify that it was accepted practice in your office, and generally in your profession, I suppose, for you to prescribe for your patient and the patient take the prescription to an [fol. 474] optician of his choice, his or her choice, to be filled and when it is filled and the patient returns to your office, your technician may check this glass that has been furnished by the optician against the prescription with a lensometer?

The Witness: That's right.

Judge Murrah: You say that is accepted practice for the purpose of determining whether or not the patient got what you prescribed?

The Witness: Whether the prescription matches what he got, that's right.

Judge Murrah: And in determining that, which you consider a very important function——

The Witness: Uh huh.

Judge Murrah: (Continuing)——for their protection.

The Witness: I always ask the patients to come back.

Judge Murrah: But you consider it to be accepted practice to have your technician check those glasses on the lensometer?

The Witness: Yes, sir.

Judge Murrah: And if the lensometer says that it does conform to the prescription, that's accepted?

The Witness: That's right.

Judge Murrah: And you would say that would be acceptable within a tolerance that you would, for which you [fol. 475] allow?

The Witness: Yes, sir.

Judge Murrah: To that extent, then, the lensometer is a mechanical device that is used by your profession for the purpose of accurately determining whether or not the eyeglass that was prescribed is the one that was prescribed?

The Witness: That's right.

Judge Murrah: Exactly.

The Witness: That's right.

Judge Murrah: Or near enough to be.

The Witness: To be acceptable.

Judge Murrah: That's right, to be acceptable. Well,

then, to that extent the medical profession does rely upon the lensometer?

The Witness: Yes, sir.

Judge Murrah: For the purpose of determining the prescriptive—well, I'm trying, I don't know just——

The Witness: Accuracy of the prescription?

Judge Murrah: Prescriptive accuracy.

The Witness: Yes.

Judge Murrah: That's what I want to say, prescriptive accuracy.

The Witness: Yes, sir.

Judge Murrah: Thank you very much.

Judge Wallace: Let me ask you this question, Doctor: [fol. 476] What percentage of the glasses that you check that have come from the optician do you find wrong, do you have any idea?

The Witness: Your Honor, it's a very small percentage, actually, I think principally because I feel that I am dealing with very good opticians that are capable, and occasionally a patient will take a prescription and leave and they may imply they are going to one optician, and they will end up seeing a frame in another window and going some place else, and that makes it of added value to recheck, but fortunately I get very few errors, and they are courteous to make them good when they are called to their attention.

Judge Murrah: What is your name, please?

The Witness: Richard Clay.

Judge Murrah: Clay?

The Witness: Yes, sir.

Judge Vaught: Let me ask you this, Doctor: Do you find that optometrists and opticians and ophthalmologists all make a mistake sometimes?

The Witness: Yes, sir.

Judge Murrah: Anything further from this witness?

Mr. Daugherty: No further questions.

(Witness withdraws)

[fol. 477] F. T. STACKPOLE, called as a witness on behalf of the defendants, being of lawful age and having first been duly sworn, testified as follows:

Direct examination.

By Mr. Daugherty:

Q. State your name, please.
A. F. T. Stackpole.
Q. What is your profession, please?
A. Optometrist.
Q. How long have you been practicing optometry?
A. Since 1931.
Q. Are you a graduate of a school of optometry?
A. Northern Illinois College in Chicago.
Q. In what year did you graduate?
A. 1931.
Q. Will you state briefly, please, what your professional society membership amounts to?
A. What my membership amounts to?
Q. Yes, what professional organizations do you——
A. (Interposing) American Optometric Association and Oklahoma Optometric Association.
Q. Where is your office?
A. 416 and 18 Midwest Building.
Q. Doctor, do you as an optometrist engage in making [fol. 478] eye examinations?
A. Yes, sir.
Q. When you make an eye examination, what do you do next?
A. I write the prescription and send it to the laboratory.
Q. What kind of laboratory do you send the prescription to?
A. Send it to a wholesale supply house, I guess would be the proper term.
Q. What happens next, Doctor?
A. They compound the prescription, put it together and send it back to me.
Q. And then what do you do in the ordinary course of your practice?
A. I check the glasses to see that they are the same as ordered.

Q. Then what do you do?

A. Then I have the patient come in and I deliver the glasses to the patient.

Q. In delivering the glasses to the patient, what do you do, exactly?

A. I place the patient in the chair and check his vision to see that it is as it should be, and adjust the frame so that it fits his face comfortably, so it's straight, and lets him see through it the way I intend him to look through them.

Q. Do you ever find an instance of error in the supply house filling your prescription properly?

[fol. 479] A. Yes.

Q. About how often, Doctor?

A. That's hard to say. It varies. Sometimes I may go for several months without an error and sometimes I may have two or three in a week; seems to depend maybe on how busy they are in the supply houses.

Q. What do you do when you find an error?

A. I send the glasses back.

Q. Do you use a dispensing optician in your practice?

A. No.

Judge Vaught: I didn't get that.

Mr. Daugherty: Did he use a dispensing optician in his practice.

Judge Vaught: Do you use——

Mr. Daugherty: A dispensing optician.

Judge Vaught: Who selects the glasses, the frames, Doctor?

The Witness: The patient. When the patient is in the office after I make the examination, I have different types of frames and I let them select them from those.

Judge Vaught: You furnish the frames?

The Witness: No, sir, I don't furnish the frames. I merely have some samples, you might say, that I show them.

Judge Vaught: Where do you get the frames?

[fol. 480] The Witness: I get them from the different supply houses. There is a number of supply houses, manufacturers, and I try to select some that I think the people would like.

Judge Vaught: You charge the patient for the frame?

The Witness: I charge the patient for the complete pair

of glasses unless he asks for a breakdown; if he does, then I tell him what the lens cost and the frames cost and the examination.

Judge Vaught: Your price to the patient is for the examination, and the lens installed in the frames?

The Witness: That's right. If he has got a frame, of course there is no charge for the frame. We charge him for what we do for him, in other words.

By Mr. Daugherty:

Q. In your practice do you frequently examine patients and find that they do not need glasses?

A. Yes, it just happened this noon during the recess. I went down there, and a patient had come in from some little town in southwestern Oklahoma, we didn't fit him.

Q. What in your practice has been the frequency of your examinations where you find the patient does not in fact need glasses?

A. I'd say that happens at least five or six times a week minimum.

[fol. 481] Q. Doctor, when a patient comes to you for an examination or with the thought that he has defective vision, do you feel that the professional relationship is created between you and that patient?

A. Oh, certainly.

Q. Do you feel responsible for the full effect of what is undertaken to be done in connection with correcting eye vision?

A. Correct, very definitely.

Q. Do you share that with anyone else; do you feel that should be your own responsibility?

A. That's my own responsibility. That's the reason that I do check the glasses when they come back from the laboratory, because it is my responsibility.

Q. What supply houses do you use?

A. Well, the biggest part of the time I use the American Optical. Sometimes I give other supply houses some work, but normally it's American Optical.

Q. Do you use several houses?

A. I use several, yes.

Q. Doctor, are you familiar with this law which is involved in this litigation?

A. Yes, I believe so, as near as a layman can be.

Q. Do you feel that in the interest of public health and welfare that the solicitation of glasses should be made [fol. 482] through the medium of advertising?

A. I think that there should be no advertising connected with it in any way.

Q. Why?

A. Well, in the first place, lots of people who aren't—in other words, well, put it this way—a pair of glasses is a pair of glasses to them, and they may wander into a place that is absolutely merchandising, you might say, they are wandering into a place that the party that is running the business is trying to sell them a pair of glasses. It is not for the good of their eyes. It's a shame that places are open that they can wander into like that. They should go to a doctor that will examine their eyes and take good care of them without being enticed in by newspaper advertising or window displays or something like that.

Q. Do you feel a person in need of eye examination or eye care, or an examination for correcting his vision, should start in the doctor's office?

A. Most assuredly. Otherwise he'd never know whether he needed eye care.

Q. Do you feel that opticians should make rebates to you or any other man making an eye examination?

A. I misunderstood you.

Q. Do you feel that an optician should make rebates to you or——

[fol. 483] A. (Interposing) No, certainly not.

Q. Or any other type of eye——

Judge Vaught: (Interposing) Is there anything in the record to date to support that contention or theory?

Mr. Daugherty: I think not, your Honor. I am trying to make a record. I believe everybody is in accordance with that.

Mr. Woods: We certainly agree there should be no rebates or kick-backs, your Honor.

Judge Vaught: I don't think that's in controversy.

By Mr. Daugherty:

Q. Do you feel that eye examinations should be made by either ophthalmologists or optometrists in the employ of a commercial enterprise?

A. They should be made by a licensed operator, that is the ophthalmologist or the optometrist.

Q. Do you feel that a professional man making eye examinations should locate his office in the middle of a retail mercantile establishment?

A. Definitely not.

Judge Vaught: In the middle of what?

Mr. Daugherty: Retail merchandise establishment.

Judge Vaught: What kind of an advertisement, Doctor, would you say would be proper for the optometrist or the optician?

[fol. 484] The Witness: Your Honor, I——

Judge Vaught: (Interposing) Downtown office, say you had a downtown office now, Main Street, what kind of an advertisement would you approve that would indicate what kind of a business it was?

The Witness: I think we should use exactly the same kind of advertising as the legal profession or the medical profession use, possibly a card, if it's very dignified. It shouldn't be anything to entice a person in, any more than for the dentist or the medical doctor or the attorney.

Judge Vaught: Would you say that it's objectionable to have the name of the optometrist or the name of the optician on his window or his door?

The Witness: No, I don't think it would be objectionable if it's in good taste and small. I think if it's an enormous neon sign or something it isn't in every good taste and it shouldn't be. I think if it's small it would be absolutely all right.

Judge Vaught: In other words, you feel that one would have a right to let the public know that he was doing business at that place?

The Witness: Oh, I have my name on my door, up on the 4th floor. I thing everyone is entitled to let people know where they are. However, I think there is legitimate and [fol. 485] clean and ethical way of doing it, and there is a way that isn't.

Judge Vaught: Is your name down on the first floor?

The Witness: No, sir, it's on the 4th floor, on the entrance to my door, the office entrance.

Judge Vaught: Not the building?

The Witness: No.

Judge Murrah: It's on the directory?

The Witness: It's on the directory in the lobby, yes, with every office, yes.

Judge Murrah: I thought——

The Witness: (Interposing) I misunderstood that was the question.

By Mr. Daugherty:

Q. Doctor, may I ask if in your opinion the preferable procedure, if it's desired to duplicate a set of glasses what that procedure would be.

A. You mean if someone came to me that wanted to duplicate a pair of glasses, is that it, or possibly——

Q. The most preferable way of——

A. (Interposing) Duplicating a set of glasses?

Q. Yes.

A. They should have a prescription by the doctor, or copy of it.

[fol. 486] Q. Is it preferable to duplicate from a prescription over duplicating from the glasses themselves?

A. Yes.

Q. Will you state why, please?

A. Well, the prescription is the original intent of the doctor. It's the way he wrote it and the way he intended for it to be filled, and when it's taken from the glasses there is always the possibility of error.

Q. How may that error come about?

A. Well, through mechanical means or through error in the operator that's operating the mechanical means. Just to clear myself on this thing, if you don't mind, can I say a few things, just a little? I went down to American Optical Company this morning, just curiosity, because I didn't know just how they did operate, and thought I would check, and they use a lensometer twice on each operation, when the lens are put, what they call set up, and after the glasses are finished, and the manager down there told me

they also had a third lensometer, so if anything went wrong wth the other two they would have an emergency one.

Q. Do they use two operators?

A. They use two operators with two lensometers on every pair of glasses. The third they use in case of variation between the two, so they can check.

Q. Is each lens checked by both operators on both lens-
[fol. 487] ometers?

A. That's right.

Q. Are there any other reasons why it may be dangerous in that an ill fitted pair of glasses may be furnished through a duplication from the glasses themselves on the lensometer?

A. Well, after all, when a person goes to have his eyes examined, he expects the best, and that's what he wants; he wants it as near prescription as he can get it, and if the glasses are improperly fitted, he is going to go right back into where he was when he came in; he's not properly corrected, he's partially corrected—and it's our desire to try to give everyone the best that we can.

Q. Might somebody produce a fragment for duplication which would be of inadequate size to permit a proper duplication?

A. No, you couldn't. You would have to have a large enough part of that lens to be able to determine the optical center, the geometric center of the lens.

Q. If someone didn't have that much of a fragment, but did undertake to 'uplicate, would the result be a matter of considerable guesswork?

A. It would be about 80% guesswork.

Q. Doctor, among your specialties do you also do contact lens work?

A. That's right.

[fol. 488] Q. You do that in connection with, along with your optometry work?

A. That's right.

Judge Vaught: I didn't get your question.

Mr. Daugherty: The contact lens work, that's the lens that's fitted inside the eyelids. He specializes in that work, too.

Mr. Daugherty: That's all. Thank you, Doctor.

Cross-examination.

By Mr. Woods:

Q. Dr. Stackpole, when you have examined a person's eyes and prescribed glasses, do you give or will you give your prescription to that person?

A. If the person asks me for the prescription, I give it to him. He is welcome to it at any time.

Q. And that's the practice you follow, that whenever your patient asks you for the prescription you give it to that patient?

A. I will give it to the patient.

Q. Then leave it to him to have filled wherever he wants to?

A. No, no; I usually, because I do want to check that work myself, maybe I'm a little conceited, but I have confidence in my own work—I like to check those glasses and be sure they are what I ordered. What I meant by giving a man a prescription, is that if you were going back to Kansas [fol. 489] City and I had had the pleasure of examining you and you said, "Maybe I get back and break my glasses", I'll give you the prescription and you can carry that in your purse any time you want to duplicate you can do it without having to take these pieces in that we were talking about.

Q. But is that the only type of situation where you give, in your practice, your patient the prescription?

A. That's the only time my patients ever ask for it.

Judge Vaught: In other words, you fill your own prescriptions?

The Witness: No, I order the glasses from a laboratory but I deliver the glasses. I mean I send the prescription to the supply house, they send the glasses back to me and then I deliver the glasses.

Judge Vaught: You provide the frame and install the glasses?

The Witness: No, I don't provide the frame, no laboratory; I have no frames other than a few samples in my office. I order the glasses complete, frame and all, see, from the laboratory, and they return them to me and then I deliver them to the patient.

Judge Murrah: They return them to you completely fabricated?

The Witness: Yes, that's right.

[fol. 490] Judge Vaught: How does the patient know what kind of frame he wants?

The Witness: I have frames in the office.

Judge Vaught: You have frames?

The Witness: I have samples there, yes, that he selects from. However, they are samples that are not for sale. It is not a stock.

By Mr. Woods:

Q. In connection with your direct testimony, you mentioned, I believe that duplications of eyeglasses, eyeglass lenses should be done by prescription; do you ever issue prescriptions to persons who request them so they can have their glasses duplicated?

A. Yes, sir, that's what I said. In case I had examined you and you went to Kansas City, asked me for the prescription—I don't ask the patient if he wants it, but if they say, "Well, I'm leaving town and I'd like to have the prescription in case I break my glasses", I will give them the prescription, they can carry it with them so they won't be running the hazard of having them duplicated by someone from these pieces.

Q. And that's when you give out your prescription?

A. That's the only time.

Q. You are familiar with the terms used in optometry and in the trade, are you not?

[fol. 491] A. I hope so.

Q. What does the term "optical supplier" mean in the trade?

A. Well, the optical supplier is the, you might say the manufacturer.

Q. Well, you mentioned you sent your glasses to A. O., that's the optical supply?

A. That's American Optical Company, yes, sir.

Q. That's an optical supplier, is it?

A. Yes.

Q. When you examine a patient as you testified on direct

examination and do not prescribe glasses, what fee, what customary fee do you charge, Doctor?

A. Well, it depends on how much time I have taken. I charge from $5.00 to $7.50 up to $25.00 on contact lenses.

Q. But now let's exclude contact lenses. Those are the lenses that fit right over the eye.

A. Well, it would run probably $5.00 to $7.50.

Q. Is it not true that in Oklahoma City the majority of the optometrists have their offices on ground floor locations?

A. The majority, you say?

Q. Yes, sir.

A. I believe that the majority of the optometrists and the medical men both do.

Q. Yes, but that's true of the optometrists?

A. Yes.

[fol. 492] Q. And is it not true that those locations are generally in retail business areas?

A. I don't believe so; I don't believe so.

Q. Aren't they either in the downtown area, like—you are familiar with Dr. Wilk, are you not?

A. What——?

Q. You know Dr. Wilk, do you not?

A. Yes, uh huh.

Q. Aren't they either in the downtown area, similar to the example of Dr. Wilk, or out in the suburban shopping areas?

A. Well, there's zoning laws that require them to be in business areas.

Q. The zoning laws don't require them to be on the ground floor, do they?

A. No.

Q. You are not opposed to the opticians, dispensing opticians advertising, are you?

A. Yes, I don't believe they should.

Q. Don't think they should advertise in any manner, way, shape or form?

A. Any way other than an ethical way.

Q. All right, what do you mean by an ethical way for an optician?

A. There's one ad in the phone directory says, "Get your Be-bop Glasses Here".

[fol. 493] Q. What?

A. Be-bop glasses.

Q. Well, what you mean is that you are opposed to misleading or fraudulent advertising, is that not right?

A. Misleading or fraudulent or advertising that was designed by someone for eyecatching appeal, I mean enormous size or such as that.

Q. Do you believe optometrists should advertise in telephone directories?

A. By advertising you mean have their listing on the yellow page?

Q. Yes.

A. Yes, surely they should.

Q. In your opinion if there is anything more than simply a man's name in the classified section of the telephone advertising, I am speaking of the optometrist, would you consider that advertising?

A. Not if he has a specialty in optometry, as for example orthoptics or contact lens.

Q. You mean that in your opinion it's perfectly all right for an optometrist in the yellow classified section of a telephone directory to put in the various types of work he does?

A. If it's in his professional work, yes, I think it's all right.

Q. And would you include in that the phrase, "complete eye care", or something of that nature?

[fol. 494] A. I think that's all right.

Mr. Woods: That's all, thank you.

Judge Murrah: May I ask you just a question to clarify a point in my mind in connection with your testimony. I have in my hand a pair of glasses that was prescribed for me and filled on a prescription by an optician. Suppose I take these glasses to your office and say, "Doctor, I want you to duplicate these lens." What would you do?

The Witness: I would check the power of the lens and possibly if it was a very complicated lens, it would depend on how complicated, I might even put you in the chair and run a little check to see if they were right.

Judge Murrah: Suppose I tell you I don't want a check. I want you to duplicate these glasses for me. These glasses just suit me. They are just exactly what I want, and I

don't want to pay for an examination. I just want to duplicate these lens. What would you do?

The Witness: I would find what the power is, and the optical center. I have an instrument that will find that.

Judge Murrah: What is the name of that?

The Witness: This is a decentering device made for that purpose.

Judge Murrah: Will you use the lensometer?

The Witness: No, I would not. I don't have a lensome-
[fol. 495] ter.

Judge Murrah: You don't use one?

The Witness: No.

Judge Murrah: Are you familiar with them?

The Witness: Yes, that is after a fashion.

Judge Murrah: Well, they are an accepted device for measuring the power of glasses?

The Witness: That's right.

Judge Murrah: And accepted in your profession as well as others?

The Witness: That's right. There is always a possibility of the thing becoming out of adjustment.

Judge Murrah: Whatever device you use it would be a mechanical instrument?

The Witness: That's correct; yes, if you didn't have the prescription.

Judge Murrah: You would use whatever mechanical device you now have in your office for measuring the power of these glasses?

The Witness: That's right.

Judge Murrah: And with that mechanical device, you would measure, determine the power of these glasses?

The Witness: That's right.

Judge Murrah: The axis of them and the spherical——

The Witness: The center and all.

[fol. 496] Judge Murrah: The center, I am trying to say.

The Witness: Uh huh.

Judge Murrah: And from that you would make me a pair of glasses, duplicate to these?

The Witness: I believe so, your Honor, here though——

Judge Murrah: Beg pardon. Well, all right.

The Witness: Here is what I was going to say. I believe I could, I believe that a world of opticians could. However,

at the present time there is nothing to keep my seventeen year old daughter from getting a pair of pliers and a neon sign and a bunch of frames and becoming a dispensing optician, and I don't——

Judge Murrah: (Interposing) I'm not asking you that. I am asking you about——

The Witness: (Interposing) Yes, they definitely could be.

Judge Murrah: These glasses?

The Witness: That's right.

Judge Murrah: And when you did by mechanical means in your office without examining my eyes duplicate these glasses and gave them to me, you would feel that you had performed a professional service?

The Witness: I believe so, yes.

Judge Murrah: Satisfactory to you?

[fol. 497] The Witness: That's right.

Judge Murrah: As a professional man.

The Witness: Yes.

Judge Murrah: And that you had rendered a satisfactory service to your patient?

The Witness: That's right.

Judge Murrah: Or your customer, as the case may be.

The Witness: That's right.

Judge Murrah: Now, do you do that sometimes?

The Witness: Very seldom. As I say, I am located on the 4th floor and very few people wander, no one wanders in there. They all come——

Judge Murrah: (Interposing) But the average, would you feel the optician on the ground floor who maintains a shop and had a lensometer or any other mechanical device that's known to you that's used for the purpose of measuring the power of glasses, could I go in to him, to one of your profession and say, as I have said to you here, "Doctor, I want you to duplicate these glasses. I just want another pair of glasses just like these." That's not an uncommon thing.

The Witness: No.

Judge Murrah: I have lost these and I ought to have two or three pairs and I would if I could afford them. These [fol. 498] glasses are comfortable, I read extensively, and I don't want them any different. Do you think you could

duplicate these glasses by your mechanical device to my satisfaction, and your satisfaction?

The Witness: I think so. If the man is trained I think he can, but as I said a moment ago there is nothing now to assure that the man is trained.

Judge Murrah: Well, it might not be. All right, could any qualified optician do that?

The Witness: If he is qualified, yes.

Judge Murrah: We have to assume that he is qualified; could any qualified optician do that?

The Witness: I think any qualified optician surely could.

Judge Murrah: Well, now, an ophthalmologist who just preceded you on the witness stand said that his office technician did it. Would you accept that?

The Witness: I believe that the office technician probably is better able to do that than some of the opticians because she is working in that office and he has probably instructed her very explicitly as to how it should be done, and I am sure that he has trained her.

Judge Murrah: Would you also be willing to say that probably that the office technician could do a better job than some optometrists?

[fol. 429] The Witness: No, I don't believe so.

Mr. Woods: No further questions.

Redirect examination.

By Mr. Daugherty:

Q. Would you prefer in the case that Judge Murrah has just given you to duplicate on his prescription rather than on the glasses themselves?

A. Definitely it should always be done. I intended to put that in there a second ago, that I really believe—now that's what I do myself; and I suppose there would be some doubt in the minds of some of them, but in a case like that, if there is any doubt about it, being a very complex correction or anything like that, I just say, "You had better go back to the doctor who fitted you." In the first place I don't know why you would be coming to me. He ought to go back to that man anyway, and I would just tell him to go back to the man that fitted him.

Judge Murrah: Well, in that connection, as I understood Dr. Clay, I believe his name is, an ophthalmologist, testified to the effect that he would issue a prescription which would be filled, and the patient would return to the office with the prescription, and that his technician ordinarily and customarily checked that prescription, those glasses, rather, against the prescription by use of a lensometer, that that was the accepted practice, and from that I understood that [fol. 500] to mean that the lensometer was an acceptable device for determining the visual accuracy of a pair of glasses which had been fabricated pursuant to a prescription.

The Witness: Probably is the most accurate.

Judge Murrah: That's all.

Mr. Woods: No questions.

Mr. Daugherty: Do you have anything further to add?

The Witness: I was going to say that this instrument has to be operated by someone that knows how to operate it, too. I mean the instrument is—the thing that I wonder about this so many times is that anyone can start being an optician tomorrow. There is nothing to keep them from being an optician, and they can be good or they can be bad. There is no doubt in my mind that there is a very definite place for opticians, but they should be trained and qualified and not just turned loose by a bunch of merchandisers that are interested in the dollar rather than the—they just see a new business and they would like to get into it.

Judge Murrah: Well now, we have had testimony from ophthalmologists here to the effect that an optician was a necessary, essential part of their practice, that they couldn't practice without them or wouldn't, certainly should not like to do so, and that they had no difficulty in having their [fol. 501] prescriptions filled by competent opticians. Do you agree with that?

The Witness: I agree with that, but there may be one for every three that aren't competent. The layman doesn't know about that, and he wanders in and he's sent to someone that maybe isn't qualified, see.

Judge Murrah: Do we understand you to testify, Doctor—we are just trying to get to the bottom of this case——

The Witness: Yes, absolutely.

Judge Murrah: Do we understand you to testify that

you would not trust an optician to fill your prescriptions and you trust no one except yourself?

The Witness: No, your Honor. I would trust some opticians. However, I feel that as long as I made the examination and that it's a doctor-patient relationship, that it's my duty to carry that thing on through and complete the service and know it's right myself. I mean without any if or ands about it. That's just the way I believe in doing it.

Judge Murrah: That's just a part of the code of your profession, that's the way that you practice your profession, and it's an attitude that you take?

The Witness: That's right.

Judge Murrah: I'm not critical of it.

The Witness: No.

[fol. 502] Judge Murrah: The Court doesn't mean to criticize it, but there are ophthalmologists, in that branch of the field of visual care, who do very readily and with complete confidence trust the optician to fill his prescriptions?

The Witness: Surely.

Judge Murrah: And when the prescriptions are filled and returned to his office, he checks the glass against the prescription by use of a lensometer, and that function is performed by his technician, usually, and they feel that in that manner his patient receives adequate and careful care.

The Witness: If it's handled that way it's absolutely all right, but I believe that you will find most of them don't have the glasses brought back to the office.

Judge Wallace: Most of the ophthalmologists?

The Witness: That's the ophthalmologists.

Judge Wallace: Now you are familiar with the decision of the Supreme Court of the United States that this referable business is no longer legal?

The Witness: That's right.

Judge Wallace: Now according to your theory, the doctors should determine who the optician should be, because you say that so many opticians, that two out of three are incapable of properly handling this matter.

The Witness: No, if I said two out of three, I meant to [fol. 503] say possibly one out of three. There is no way of knowing. I am sure there are lots of them that are very capable, but I also know and a man with his eyes open, a

little observation can see, that there are some of them that aren't. I think that the doctor owes to his patient to at least give him a list of two or three of those that are qualified and competent, instead of just turning him loose, and also feel that he should—whether he does or not—I feel that he should check the glasses on the patient sometime later and see that they are what he ordered.

Judge Murrah: Just for your information, one very competent witness, a witness whose competency, I dare say, could not be questioned, testified that he seldom required his patients to return for a check. I understand your testimony is to the effect that you think he should do that.

The Witness: That's a personal opinion. I like to give that kind of service myself and know what they are getting.

Judge Murrah: That's all right. That's all.

Judge Wallace: How do you check yours; you do not have this lensometer that they are talking about.

The Witness: I neutralize them. I have this centering device that's used in laboratories for centering a lens.

Judge Wallace: You consider that as good as the lens-
[fol. 504] ometer?

The Witness: What?

Judge Wallace: Do you consider that as comparable to the lensometer?

The Witness: After twenty-some years, yes.

Judge Wallace: The ordinary practitioner then wouldn't know how to do that; you would have to have the experience that you have had?

The Witness: Yes, I believe that's right.

Judge Wallace: Otherwise the lensometer would be preferable?

The Witness: It would be easier. It wouldn't take as long to do. It's a lot easier.

Judge Murrah: And just as accurate?

The Witness: Well, the lens that I neutralize with will never change, the lensometer might; but I am not going to argue about how that machine can get out of——

Judge Murrah: (Interposing) You don't doubt the accuracy of the lensometer?

The Witness: No. I know that it's possible for it to get out. I know that the lens that I neutralize with will never

get out because they are ground and they are going to stay that way, but that's a minor point.

Judge Murrah: I see. Thank you, Doctor.

[fol. 505] Recross-examination.

By Mr. Woods:

Q. By your neutralizing process, you use what is known as a trial case?

A. That's right.

Q. And that's a series of gound lenses of predetermined strength?

A. Yes.

Mr. Woods: That's all.

Mr. Daugherty: That's all. Thank you.

Judge Murrah: You are excused.

(Witness withdraws.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Daugherty: If the Court please, we have one other witness, but in the hope that we can get through today, which will probably meet with the approval of the Court, I believe we will rest our case at this time.

Judge Murrah: You are perfectly free to.

Mr. Daugherty: I know that, your Honor. The testimony of this other witness would be cumulative to what you already have.

Judge Murrah: Well, I think that you have undoubtedly covered the field, that is it would seem to the Court that you have. You know more about that, whether you have. Do you think the Court has a pretty clear picture, of the whole case, of both sides? Of course you would like to go [fol. 506] into the background a little more, I suppose?

Mr. Woods: Yes, your Honor.

Judge Murrah: Anything further?

Mr. Daugherty: We have nothing further.

Mr. Woods: We have nothing further, your Honors.

Judge Murrah: Now what is your pleasure about argument and briefs, and what is indicated in the case? Would

you prefer to argue the case now? I'm not sure that I speak for my co-counsel——

Mr. Woods: I understand, your Honor.

Judge Murrah: But I would prefer if you are going to argue the case and you want to brief it further in the light of the testimony that is introduced, I would prefer to have it briefed and then argument, pursuant to which we would render a decision very quickly.

Mr. Woods: That would be quite acceptable to us, your Honor.

Judge Murrah: If you would like to argue it now—I have always felt an oral argument and then brief, it of course it's not very helpful.

Mr. Woods: Yes, your Honor.

Judge Murrah: In a situation like this.

Mr. Woods: I would think in this type of situation the best way to handle it is to brief it and argue after those briefs have been submitted.

[fol. 507] Judge Murrah: I have in mind—I will confer with my associates in just a moment—but I have in mind that we have a rather, what we might say, kind of a different lawsuit here that's taken shape today, and I assume that your approach would be somewhat different in view of the concessions made by the State today.

Mr. Woods: Yes, sir.

Judge Murrah: And so you will want to have those pleadings which have not been filed, I understand, that will be amended—and you are granted leave now to amend the pleadings.

Mr. Hansen: Yes, sir.

Judge Murrah: I am sure you understand the nature of them and you would have no objection to that.

Mr. Woods: That's correct, your Honor.

Judge Murrah: How much time do you want to amend your pleadings, just a few days?

Mr. Hansen: I think I can file it tomorrow.

Mr. Duvall: We would like to argue the case after the brief.

Mr. Woods: After briefing it, your Honor.

Judge Murrah: Do you insist upon it?

Mr. Woods: Well, I always prefer it if I could to orally argue a matter. I don't think it would require a great deal

of time, but at the same time I know it's helpful for a [fol. 508] lawyer to get to argue.

Judge Murrah: Surely. We understand that, too.

Judge Vaught: How much time do you want to file your brief?

Mr. Woods: If your Honor please, I would like at least to have a chance to see some of the transcript of this testimony. Once we have that we can file our brief rather promptly, I would say.

(There was a brief discussion re the transcript, whether or not all of it would be required and what time it would be available, the reporter estimating two weeks from this time for its delivery, and the plaintiffs were given fifteen days from the time of delivery of transcript for brief and the defendants given fifteen days after the filing of the plaintiffs' brief for answer brief; and upon request Mr. Hansen's time for filing his amended answer was extended from tomorrow to five days, upon which latter point Judge Vaught stated: "Five or ten days, whatever you need on that"; and Mr. Hansen, upon inquiry, was informed by Judge Murrah that if he found it necessary to make some change in response to pleadings he might have permission to do that.)

Mr. Woods: One thing more I want to bring up to the Court, and that is, may this restraining order be continued until the case is submitted?

Judge Murrah: Yes; you agree to that?

[fol. 509] Mr. Hansen: Perfectly satisfactory.

Judge Murrah: Now then, the order then is, I think that in view of what Mr. Reporter has stated, that at this particular stage we can be safe in giving you thirty days from this date to file your brief.

Mr. Woods: Very well, your Honor.

Judge Murrah: If for some reason the reporter doesn't get the transcript to you within the time that he has indicated here, you will let us know and we will extend that. You would have fifteen days after that.

Mr. Hansen: Perfectly satisfactory.

Judge Murrah: To file that, so it will be thirty, fifteen and five.

Mr. Woods: Thank you, your Honor.

(There was a brief discussion of the time argument would be set.)

Mr. Woods: One more thing, in connection with the remarks that you made to me about the background material, I wonder if I might have leave to submit a brief that I have prepared on the admissibility of such type documents, just for the Court to consider? I didn't want to take the time to argue that at great length this morning.

Judge Wallace: Yes, sir.

Judge Murrah: I may be in the minority in that respect anyway, and I may have held you too close.

[fol. 510] Mr. Woods: I wanted permission to submit my authorities.

Judge Vaught: Submit it in your brief.

Judge Wallace: Just a minute, if you want to get those in the record, why don't you offer them and let the other party object, and the Court sustain your objection; that way you have got them in.

Judge Murrah: You didn't offer them after my lecture to you?

Mr. Woods: No, sir, I did not.

Judge Murrah: Well, I didn't mean to deprive you of the right to make the record, so you offer them.

Mr. Woods: I had thought the Court had already ruled on them, but at this time the plaintiffs will offer Exhibits 2 through 12 inclusive and 16, for the purpose of establishing this background for the constitutional question in this litigation, and not for the truth of what is contained in those but purely for background material.

Judge Murrah: Now very well. Your objection will be sustained without prejudice to the right to argue as to the admissibility of it in your brief.

Mr. Woods: Very well.

Judge Murrah: And if it develops, if we decide that part of it or any part of it is admissible, you are not being prejudiced, no one is being prejudiced by the admission [fols. 511-513] at the time of argument.

Mr. Woods: The Clerk has those exhibits.

Judge Murrah: What we have in mind, or what I have in

mind is simply that just a statement by someone, profes-sional statement, is not rendered admissible because it does so through some journal. I think that's the law.

Mr. Woods: Hearsay, I grant you that.

Judge Murrah: All right, that's all?

Mr. Woods: That's all.

Judge Murrah: Great pleasure to have you. Well tried The Court will recess subject to call.

(Whereupon the proceedings in the heretofore styled and entitled cause were adjourned.)

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 514] In the United States District Court

[Title omitted.]

Deposition—October 15, 1953

[fol. 515] Dr. Arthur M. Culler, called as a witness on behalf of the plaintiffs, having been first duly sworn on oath, deposeth and saith as follows:

Direct examination.

By Mr. Phillips:

Q. Will you state your name, please?

A. Arthur M. Culler.

Q. Will you state your profession or occupation, Doctor

A. I am an ophthalmologist.

Q. Are you connected with any university?

A. Yes.

Q. Will you state what university, sir?

A. Ohio State University.

Q. Are you connected with the Medical Department of the Ohio State University?

A. I am chairman of the Department of Ophthalmology in the Medical School.

Q. Will you state the degrees you hold, sir, and the colleges or universities which you attended?

A. A.B. and M.D., University of Michigan.

Q. Will you state the professional associations of which you are a member?

[fol. 516] A. Well, American Ophthalmological Society, American Medical Association, American Academy of Ophthalmology and Otolaryngology.

Mr. Daugherty: Doctor, will you talk a little louder? We cannot quite hear you over here.

The Witness: Association for Research.

Mr. Phillips: Q. Are you an officer or member of any committees of those associations, sir?

A. Yes, I am a member of the Joint Committee of Optics and Visual Physiology, and chairman of the National Interprofessional Committee on Eye Care. I am a member of the Armed Forces Committee of the Academy.

Q. All right, sir. Are you familiar with the general field of the practice of ophthalmologists and the general methods which they employ in such practice?

A. Yes.

Q. Do ophthalmologists prescribe eye glasses?

A. Yes.

Q. What does the prescription of an ophthalmologist ordinarily contain, sir?

A. Most ophthalmologists only write prescriptions giving the data in regard to the lens required.

[fol. 517] Q. The prescription does not contain data respecting the frame?

A. That is right.

Q. Does it contain data respecting the fitting of the eye glass or the frame to the face?

A. Ordinarily not.

Q. Are you familiar with the general field of practice of optometrists?

A. In a general way, yes.

Q. Go ahead, sir.

A. May I revise that and say yes.

Q. Do the optometrists prescribe eye glasses, or lenses, sir?

A. Eye glasses.

Q. Eye glasses?

A. Yes.

Q. Does the prescription of optometrists contain ordinarily a prescription for lenses?

A. The usual practice among optometrists is to dispense glasses, though some of them write prescriptions.

Q. The usual practice is to dispense their own eye glasses?

A. Right.

Q. Are you familiar with the services generally per[fol. 518] formed by opticians?

A. Yes.

Q. Will you describe those services, sir?

A. Dispensing opticians fill prescriptions for eye glasses.

Q. Does the filling of the prescription for eye glasses include the grinding of the lens?

A. Yes, ordinarily.

Q. What activity with respect to the lens does the dispensing optician undertake, sir?

A. Most dispensing opticians don't have surfacing shops. They obtain lenses ground to prescription from wholesale houses, edge the lenses, mount them in mountings, and fit those to the patient.

Q. When you say fit——

A. Now I am taking these up backwards because actually the position of the lens in front of the eye is an important thing, and perhaps the most important service that they render is a matter of deciding how the lenses should be ground so that they will be centered properly in front of the patient.

For instance a frame, particularly these modern frames often are made to look right on the face, but it takes a considerable skill to position a lens properly in front of the [fol. 519] eye in those frames.

Q. In positioning the lens in front of the eye you mean fitting the frame to the face of a patient?

A. No. The point I was trying to make is that very often the center of the lens——

Q. Yes?

A. ——if those were just assembled in a factory and sent out, as happens in industrial setups, often you buy

things wholesale and they are just shipped out and given to the people, well those lenses have very little prospect of being centered properly for the eye.

Q. So it is the duty of the optician to see that the lens is centered properly to the eye?

A. To see that it is made properly so that it is centered when it is dispensed.

Q. Is it the duty of the optician to adjust the bridges?

A. Yes.

Q. The pads?

A. Yes, that is right.

Q. And the temples of the frames so as to fit the face of the patient?

A. Yes.

[fol. 520] Q. Is the performance of these duties by opticians an act of apparently recent origin, or is it a traditional field of activity?

A. It is a field much older than optometry.

Q. State whether or not in your opinion an optician must have the training and educational background of an ophthalmologist in order to perform the services which you have just described.

A. It is not necessary for an optician to have training in the examination of eyes. I think in many ways it is desirable that they do not have such training.

Q. In your opinion, sir, is the function of the optician in performing these services the function of a semi-professional or skilled craftsman?

A. Exactly.

Mr. Daugherty: I didn't get the answer to that.

Mr. Phillips: Exactly.

The Witness: Exactly.

Mr. Daugherty: Which one? Skilled craftsman or semi-professional man?

The Witness: Skilled craftsman.

Mr. Phillips: Skilled craftsman.

Q. Doctor, state whether or not in your opinion the opti-[fol. 521] cian in order to perform these services must have the training and educational background of an optometrist in order competently to perform the services you described.

By that, sir, I mean all of the training and educational background which the optometrist is required to have.

A. No, I believe that it is not necessary or even desirable for opticians to be trained in the examination of the eyes.

Q. Sir, from your experience in the instruction of ophthalmologists what would be your opinion with respect to the qualifications of the ordinary ophthalmologist to perform the skilled crafts and services which you have described as being performed by opticians?

A. I am sorry, sir, I didn't get that.

Mr. Phillips: Will you read the question to him?

(Question read by the reporter.)

The Witness:

A. Well in general ophthalmologists should know the essential points of dispensing opticianry, but as regards experence and skill in accomplishing the results, ophthalmologists never acquire that, and I think very few of us [fol. 522] would have the patience to do it properly.

Mr. Phillips:

Q. And if I understand you correctly, sir, is it your opinion that the ophthalmologist should understand the principles involved?

A. That is right.

Mr. Phillips: I believe that is all the questions I have. Go ahead.

Mr. Daugherty: Off the record.

(Discussion outside the record.)

(Deposition resumed at 1:55 o'clock P.M.)

Mr. Phillips: Let the record show that Dr. Culler is here under subpoena and is not voluntarily appearing on behalf of any party to the lawsuit.

Mr. Daugherty: Of course he is appearing pursuant to your subpoena.

Mr. Phillips: Yes. I inserted the word voluntarily.

Mr. Daugherty: I think perhaps that the record should show that it is now five minutes until two o'clock, and the doctor has to catch a limousine for the airport at 2:20, so I will necessarily cooperate to that extent.

[fol. 523] Cross-examination.

By Mr. Daugherty:

Q. Doctor, are you familiar with the litigation involved in this lawsuit in which you are testifying?

A. Unfortunately only by hearsay.

Q. Have you read the law involved in this lawsuit?

A. No, I haven't.

Q. Has anybody attempted to explain it to you?

A. Yes, I heard a little about it.

Q. Has it been represented to you by anybody that this law attempts to put the dispensing optician out of business in Oklahoma?

A. No.

Q. You are not laboring under that impression then at this time?

A. No.

Mr. Phillips: You answered "No," Doctor?

The Witness: I answered no.

Mr. Daugherty: I believe in view of the doctor's need to leave, that I will not ask him to read the bill.

Q. But if you don't mind, Doctor, I might like to ask you your opinion, your professional opinion as an expert in the field of human vision, as an ophthalmologist, what you think [fol. 524] about certain things that might be the subject of legislation, in the public interest and for the public health and welfare.

First let me ask you if in your opinion anyone is qualified to make an eye examination other than regularly licensed ophthalmologists or physicians or optometrists. Is there any other profession in your opinion qualified to make an eye examination?

A. No.

Q. Or refraction?

A. No.

Q. You think it is for the public good that a law might require that no unqualified person should be permitted to visually correct the eyes of another?

A. Yes, I agree with that.

Q. You think that is for the protection of the public, to see that they get good eye care.

Is it your opinion, Doctor, that an ophthalmologist or optometrist might issue a prescription which can be delivered to an optical supplier or dispenser to fill? Is there anything wrong with that provision in the law?

A. As these fields are generally understood in the United States, and as we train people for these fields, there are [fol. 525] three necessary fields in the care of the nation's eyes, ophthalmology and optometry and opticianry. They are inter-related and sometimes overlapping fields. They are all necessary.

Q. Then this law has no bad effect on the public if it permits an ophthalmologist or optometrist to issue a prescription to an optician to fill?

A. This law has no bad effect on the public if it doesn't restrict the dispensing unnecessarily and create hardships in that respect.

It is my impression from hearsay that the law in its present form does limit the activities of the dispensing optician so that he can't provide the best service.

Q. Well my question was is there anything wrong in making it legal for an ophthalmologist or an optometrist to make an examination and then write a prescription and send it to an optician to fill. Is that all right?

A. Yes, that is all right.

Q. That is the usual practice, is it not?

A. That is the usual practice.

Q. For the ophthalmologist. What I am trying to put [fol. 526] over to you, Doctor, is that this law permits that procedure.

A. Yes.

Q. And I just wanted your opinion if that procedure is satisfactory, in your professional opinion.

A. Yes.

Q. Do you feel that eye examinations should be conducted by ophthalmologists and optometrists on a professional basis with professional responsibility?

A. Yes.

Q. You don't advertise your services of course, do you, Doctor?

A. No.

Q. May I ask are you a practitioner as well as an instructor?

A. Yes.

Q. Do you feel that ophthalmologists or optometrists should receive rebates or kickbacks from opticians?

A. No.

Q. Do you think that ophthalmologists or optometrists should permit opticians or anyone else to solicit business for them?

A. By advertising?

Q. By advertising or any other method.

[fol. 527] A. If you mean by that should an optician be restricted from advising friends——

Q. I don't mean that.

A. ——in regard to qualified men, I think that is one of the natural rights.

Q. It is a necessity in a profession, I realize that, Doctor. We have it in the law as well as you have it in medicine. If people don't send their friends to us so that we can help them, we don't get clients and you don't get patients. But I think perhaps I should tell you what the word solicitation means. I think the impact of it rather means an active going out after people and taking them in to somebody to get a certain piece of work done.

A. Yes.

Q. And in the sense of professionalism do you feel that professional people should use solicitors for business?

A. I am against all forms of advertising and solicitation in regard to the care of the eyes.

Q. Do you feel that eye examinations should be conducted on a professional basis rather than on a commercial basis?

A. Yes.

[fol. 528] Q. Do you think it is a law in the public interest to prohibit ophthalmologists or optometrists from making

eye examinations as an employee of any lay group or lay body or commercial interest or commercial enterprise, but rather that they should be limited to making eye examinations as professional men?

A. Yes, I agree to that.

Q. Do you believe any and all measures of legislation which tend to keep eye examinations on a professional basis rather than on a commercial basis is good legislation for the public health and welfare?

A. Yes.

Mr. Daugherty: Do you have any questions?

Mr. Harkin: No. That is all, Doctor.

Mr. Phillips: Now you have the right, Doctor, to read this deposition and sign it before it is submitted to the court, or you may waive that right, in which event the court reporter will forward it immediately.

Do you desire to read and sign your deposition?

The Witness: No, I think that you won't get the sense of anything wrong. I didn't make any very complicated answers.

(Signature waived.)

[fols. 529-532] Certificate of Notary Public to Deposition (omitted in printing).

[fol. 533] In the United States District Court

[Title omitted]

Deposition—October 15, 1953

[fol. 534] Dr. Frederick C. Cordes, called as a witness on behalf of the plaintiffs, having been first duly sworn on oath, deposeth and saith as follows:

Direct examination.

By Mr. Phillips:

Q. Will you state your name?

A. Frederick C. Cordes.

Q. Will you state your profession or occupation?

A. I am an ophthalmologist.

Q. Dr. Cordes, will you state the degrees you hold?

A. I hold an A.B. and an M.D. at the University of California.

Q. Dr. Cordes, are you associated with any university at this time?

A. I am the chairman of ophthalmology at the University of California at the Medical School.

Q. Dr. Cordes, are you a member or officer of any professional societies?

A. Yes, I am.

Q. Will you state the offices you hold and the societies of which you are a member?

[fol. 535] A. I am the president of the American Academy of Ophthalmology and Otolaryngology.

You don't want all the societies, do you?

Q. Just the most important ones, sir.

A. A member of the American Ophthalmological Society, a member of the Section on Ophthalmology of the American Medical Association, a member of the Association for Research and Ophthalmology, a member and past president of the Pacific Coast Otolaryngological Society, and a fellow of the American College of Surgeons.

Q. As head of the Department of Ophthalmology of the University of California are you familiar with the general field and methods of practice of ophthalmologists?

A. I am.

Q. Do ophthalmologists prescribe lenses for eye glasses?

A. At this point I would like to have it clearly understood that in testifying this morning that I am not doing it of my own free will for the defendant, but merely because I have been subpoenaed.

Q. Or the plaintiff, sir.

A. Or the plaintiff.

[fol. 536] Q. All right, sir.

Mr. Branton: Either one.

The Witness: Or the plaintiff, that is right.

Mr. Phillips: That is right.

The Witness: But only because I have been subpoenaed.

Mr. Phillips: Let the record show that Dr. Cordes is

here under subpoena and not voluntarily, and appearing as a witness on behalf of either the plaintiff or the defendants in this action.

Mr. Branton: Now will you state the question again to him?

Mr. Phillips: Will you repeat the question to him?

(Question read by the reporter as follows:

"Q. Do ophthalmologists prescribe lenses for eye glasses?")

The Witness: A. Yes, they do.

Mr. Phillips: Q. Would you state the content of such prescriptions?

A. Well the content contains descriptions for the optician as to the strength of the sphere of the cylinder, and its axis, and any prisms that may or may not be indicated.

Sometimes it includes descriptions to the optician as to [fol. 537] the interpupillary distance, but usually that is left to the discretion of the optician, it being routine that for the completion of a pair of spectacles, that the patient returns to the office and that the glasses are inspected and checked.

Mr. Daugherty: At the office of the ophthalmologist?

The Witness: That is right.

Mr. Phillips: Q. Is it the custom of ophthalmologists to issue such prescriptions to their patients for filling by opticians?

A. Yes, sir.

Q. Are you generally familiar with the services performed by opticians?

A. I am.

Q. Would you describe those services?

A. The optician receives the prescription from the patient, makes up the lenses according to that prescription, he checks over with the patient the type of frame or the style of frame that they prefer, he then makes the necessary measurements as to the interpupillary distance, that is the distance between the pupils of each eye, he then makes up these lenses, adjusts the frame to be certain that they are comfortable and that they fit properly, and that also

[fol. 538] part of his service is afterwards that the patient is apt to return to him whenever the glasses need readjusting.

Q. You have testified that in general practice the ophthalmologist will ask his patient to return to have the eye glasses checked?

A. That is correct.

Q. After the performance of the optician's functions?

A. Yes, sir.

Q. Would you state the purpose of that recheck?

A. To be certain first of all that the glasses are properly made, that the lenses are properly ground, that they fit properly, and that the position of the lenses, particularly in bifocals, is in the proper position.

After all we are dealing with human beings, and there are times when an ophthalmologist may make an error in writing his prescription, and this also gives him an opportunity of checking it to be certain that they are correct.

Q. Is it also true, sir, that a competent optician may have made an error in filling the prescription?

A. That is correct.

Q. And that the purpose of your recheck is to prevent [fol. 539] the factor of human error in such instances?

A. On both sides, yes.

Q. Yes, sir. In your judgment, sir, is it necessary that an optician have the training and educational background of an ophthalmologist in order competently to perform the services which you have described as traditional in his field?

A. No, it is not.

Q. Would it be your judgment, sir, that it is necessary for an optician to have the training and educational background of an optometrist——

A. No, it is not.

Q. —in order to competently perform the services?

A. We have the peculiar situation in California that many of the optometrists now have offices and refuse to fill ophthalmologist's prescriptions at any time, even though they may be old patients, so that they feel that they are more than just people who fit frames and lenses and adjust them, and look upon themselves more in the nature of a profession.

Q. Yes, sir.

A. Rather than the type of work that is done by the optician.

Q. Is the field of opticianry which you have described a [fol 540] field of recent origin or ancient origin?

A. That is a little difficult to answer, because in the past an inferior optometrist was an optician and an optometrist.

With the recent advances in the last perhaps fifteen years of the development of good schools of optometry by our various universities, one of which is the University of California, and I happen to be on the advisory curriculum faculty of that school, with the development of these schools the plane of the optometrist has been elevated a great deal, so that one can look upon him more as a professional man, and therefore with that distinction there has developed a difference between the two groups, so that for example in the State of California the opticians are now licensed under the Board of Medical Examiners, whereas the optometrists have their own licensing boards.

Q. If I understand you correctly California has licensed opticians as a distinct group?

A. Yes, they are licensed under the State Board of Medical Examiners.

Q. I see. Will you state whether in your judgment an optician is a professional man or a semi-professional man [fol. 541] or a skilled craftsman? Which or any of those in your judgment is the proper classification for the services of the opticians as you describe them?

A. In my opinion the right type of optician is more of a skilled artisan than he is a professional man.

Q. Yes, sir.

A. And he is to be more than a mere merchandiser. I mean he has to have adequate training in the basic principles of physiological optics, as far as centering the lenses are concerned, and he has to of course have the skill of properly fitting the frame so that it is comfortable, and realizing how it should be adjusted to avoid interference from the lashes, and position of the eyes and the skull and things of that sort.

Q. In your opinion, sir, is the regulation of the practice of opticianry by statute similar to those in your State of California in the best interests of public health and welfare?

A. Very definitely.

Q. Doctor, you have testified that a school of optometry constitutes a part of the University of California?

[fol. 542] A. That is right.

Q. Does the school of optometry afford instruction in professional ethics and standing in optometry to its students?

A. I can't answer that very positively, except that I am quite certain that they do, because of the fact that I know the head of the school of optometry quite well and have many conferences with him, and know what his ethical standards are, and I am certain that they do.

As a matter of fact I met with him just three nights before coming on to Chicago, in which we discussed some of these things, and I know that the thing that they emphasized in their discussion was that there was no quarrel at all between the optometrist and the optician.

They feel that the time has come when the optometrist is to be considered a professional man rather than an artisan or a skilled artisan, and as they told me, and I was speaking to one of the heads of one of their big national organizations who was there, and he was the one who emphasized the fact that with the new code of ethics of the optometrists as it was developing, they are going into offices, they permit, [fol. 543] in certain localities the optometrists permit no advertising of any sort, no signs on the windows, no neon signs and advertising in the paper, and they are very definitely attempting to elevate it to a profession; and he emphasized particularly because of the fact that he knew that the opticians are under the medical group, that they had no quarrel at all with the optician. In fact he emphasized a number of times that the modern optometrists with their new standards of ethics will not fill a prescription of an ophthalmologist. They feel that they should be filled by an optician.

Q. Doctor, in the development of the professional trend of optometry to which you testified is there a trend on the part of optometrists, is there or is there not a trend on the part of the leaders of optometry to eliminate any dealing with merchandise on the part of optometrists?

A. If you mean by merchandising the question of setting up display windows and displaying frames and making an

attempt to sell new styles and all that sort of thing, my answer would be yes, because in talking to these men, that is one of the things that they emphasized that they disap- [fol. 544] proved of optometrists having display windows with frames and glasses and things of that sort. They felt that they belonged into the field of the optician and not into the field of this profession that they are developing.

Q. Is there any trend to your knowledge on the part of optometrists to change the practice of optometry to a practice of the nature of ophthalmologists in their field so as to eliminate the dispensing of eye glasses?

A. As I understand it they are going to continue to dispense their own glasses, but they send the directions for the proper grinding and the type of frame and the interpupillary distance and so forth to the wholesale houses, wholesale optical houses who make up the glasses, and then deliver them to them, and then they fit them to the patient.

Q. In your judgment, sir, does the method of practice of ophthalmologists and the trends in the practice of optometry make increasingly important—make more or less important the development of skilled competent opticians as a separate skilled artisanry?

A. Well I think that is brought out by the fact that in recent years they have developed schools of opticianry. We [fol. 545] have one in California, in the Los Angeles City College, I believe it is.

Q. I see.

A. In which they now have a—I think they receive a degree. I don't know the details of their curriculum, but they do get training in the art of opticianry, if you wish to call it that.

Q. And is that training and the development of those skilled opticians in your judgment an important aspect of the whole field of visual care?

A. I feel it is a very definite trend toward what is going on in the field of the compensation of vision, that is to give better and better care to eyes.

That is true of all the groups. The ophthalmologists are improving, the optometry schools are improving, lengthening their curriculum, and I feel that this is part of that same trend.

Q. You have testified to the establishment of schools in Los Angeles City College. Have you of your own knowledge observed the establishment of similar educational institutes elsewhere, or do you know of the establishment of similar educational institutes elsewhere?

[fol. 546] A. I know there are several new ones elsewhere, but I cannot tell you where they are. No, I don't know, but I do know that they exist.

Q. Are you familiar with the function of the Board of Opticianry?

A. Only very vaguely.

Q. I see.

Mr. Phillips: That is all. Mr. Daugherty, do you care to question?

Mr. Daugherty: Thank you.

Cross-examination.

By Mr. Daugherty:

Q. Doctor, are you familiar with this lawsuit in which you are giving your testimony?

A. Very vaguely. I have heard a little about it. Mr. Phillips talked to me the other day about it.

Q. Has it been represented to you that this law in Oklahoma puts the dispensing opticians out of business?

A. No, I didn't quite understand that. I am not familiar with the law, but as I understand it, that it put definite limitations on them; but I am not familiar with the law.

[fol. 547] Q. Have you read the law?

A. I have not.

Q. You are not familiar with any of its contents?

A. Very vaguely.

Q. It hasn't been represented to you that it puts dispensing opticians out of business then?

A. No, that hasn't been stressed.

Q. With your permission may I go over some of the provisions of this bill with you and get your opinion——

A. Surely.

Q. —as to whether or not these are good laws with reference to public health, public welfare, and in particular the visual care for the people of Oklahoma?

A. Surely.

Q. Do you think this is a good bill when it provides for th people of Oklahoma that its citizens should receive the be possible visual care?

A. Naturally.

Q. You will agree with that?

Mr. Branton: Excuse me. I would like to interpose an o jection to this whole line of questions on the ground tha the law is being presented to the witness in a piecemea fashion, with no opportunity of the witness to read an [fol. 548] for his own edification interpret the law as a whol You may continue.

Mr. Daugherty: I will be very glad to have the witne read the law if he wishes to take the time.

The Witness: No. I am sorry.

Mr. Daugherty:

Q. Do you agree that it is good for the public health for law to provide that in getting the best possible visual ca that that should only be obtained through the efforts of wo trained ophthalmologists and optometrists?

A. I don't think that is putting it very well, no. I mea that certainly wouldn't work in our state, because th opticians are a very important part of that setup, as far a our state is concerned, as are other agencies, which also hav definite bearing on the care of the vision of the state.

Q. I don't think you quite understand the import of th question. Let me ask you this first then, Doctor, is it you opinion that the ophthalmologist or the optometrist is ful responsible for the visual care of his patient once that rel tionship is created.

A. No, I don't, because you cannot hold an optometri responsible for diseases of the eye, for which he has [fol. 549] been trained, so I don't think you can say yes to question of that sort.

Q. Well let's eliminate diseases of the eye, which I a sure we will all agree are not part of the practice optometry, that is, the treatment of them is not.

A. That is right.

Q. So let's eliminate that, but the question that I am as ing, Doctor, is do you believe that eye examinations ar

eye care should be handled on a professional basis? Do you not?

A. Well what do you mean by eye care?

Q. Well I mean if somebody needs glasses.

A. Yes.

Q. And they come to an ophthalmologist or an optometrist, that they then create a professional relationship?

A. That is right.

Q. Don't you feel that eye examinations should be handled on a professional basis?

A. Eye examinations, yes, sir.

Q. And is there anyone qualified to make eye examinations except an ophthalmologist or an optometrist?

[fol. 550] A. To make the eye examination?

Q. Yes.

A. Not in our state.

Q. Well do you know of anyone else who in your opinion is qualified to make an eye examination?

A. Well according to the law a general practitioner can do that; any physician.

Q. You are talking about any M. D.?

A. Yes, any physician.

Q. Well any physiciaa or any optometrist.

A. That is right.

Q. In other words the question I am asking is very simple, Doctor. This law provides that prescriptions for glasses based on an eye examination should only be written by optometrists or ophthalmologists, or I should say physicians, M. D.'s?

A. Yes.

Mr. Phillips: Counsel——

Mr. Daugherty:

Q. Is there anything wrong with that?

Mr. Phillips: Do you wish to clarify the term "prescription for glasses"?

The Witness: Yes, I was going to ask, you mean merely writing out the descriptions for the optician as to how the lens should be made?

[fol. 551] Mr. Daugherty:

Q. That is right.

A. That is a prescription for glasses, yes, sir.

Q. Other words making examinations followed by a prescription.

A. That is correct.

Mr. Phillips: For lenses.

Mr. Daugherty:

Q. For lenses, yes.

A. Yes. I mean I assume that we are talking about glasses.

Q. For eye glasses, that is right.

A. Yes.

Q. In other words the law says that for the people of Oklahoma only physicians or optometrists shall write prescriptions for eye glasses.

Mr. Branton: Excuse me. For the record I would like to interpose an objection here on the ground that it is an attempt by counsel to interpret the law of Oklahoma.

The Witness: May I ask, because I have been very busy here as president of this organization and I haven't had time to go over this, could you outline for me in a general way just the various things that this law includes?

Mr. Daugherty: That is what——

[fol. 552] The Witness: And then let me go over them one at a time afterwards.

Mr. Daugherty: That is what I was attempting to do, Doctor.

The Witness: Well I would like to get a brief overall picture first.

Mr. Daugherty: That is what I want to do.

The Witness: Yes, please.

Mr. Daugherty:

Q. I will run down these salient points with you, and then take them up one at at time with you.

A. Yes, that is fine.

Mr. Branton: My objection goes to this whole line.

Mr. Daugherty: As far as I am concerned your objections can be made at the time the thing is introduced in evidence, except for leading questions.

Mr. Branton: Very well.

Mr. Daugherty:

Q. This law provides that it is the public policy of Oklahoma that the citizens of Oklahoma should receive the best possible visual care through the efforts of well trained and qualified ophthalmologists and optometrists, and that no unqualified person should be permitted to visually correct for compensation the eyes of another.

[fol. 553] A. May I ask just what that means?

Q. Well——

A. I mean that might be interpreted that the optician who makes it, makes lenses, is compensating for a visual defect.

Q. That will be covered a little later on.

A. I see.

Q. I am satisfied of that, to your satisfaction.

The further provision that it is unlawful for anyone but an ophthalmologist or a physician or an optometrist to examine and fit and adjust glasses and so forth, except that an optical supplier may do that, may interpret the prescription and may fit, adapt and adjust the glasses, provided he has a written prescription from either a physician or an optometrist.

The law further provides that the physician or the optometrist that writes the prescription shall remain fully responsible for the effect of any appliances that may be furnished the patient pursuant to that prescripition.

The law further prohibits advertising the sale of glasses to the public by means of newspaper advertising, window displays, radio, television, and prohibits any means of bait [fol. 554] advertising whereby the public is enticed and persuaded to come into some place for the purpose of securing eye glasses.

Mr. Phillips: May we interpose an objection for the record here that counsel is not in our opinion accurately summarizing that law.

Mr. Daugherty: I think when I have finished I will ask

the doctor to read the law so that he will have it in its entirety, but I will continue, if I may.

Mr. Phillips: Yes, sir.

Mr. Daugherty:

Q. The law further provides that it is unlawful for a physician or an optometrist to receive rebates or kickbacks from opticians.

It further provides that it is unlawful for an ophthalmologist or optometrist to permit an optician or anyone else to solicit business for him.

The law further provides that it is unlawful for an ophthalmologist or an optometrist to make an eye examination as an employee of a lay person or a lay body or a lay group.

And the inverse of that, it provides it is unlawful for any lay person to obtain an eye examination through the employment of a physician or an optometrist on a salary or [fol. 555] on a commission basis.

We sometimes call that a prohibition against corporate practice.

As a further provision, that provides that a retail merchandising store shall not rent space in its establishment to anyone making an eye examination.

Now I would like to let you read the bill, Doctor, if you will, and I think with that statement as to the highlights of the bill as I see them, then perhaps I can go over it feature by feature with you.

A. Aren't you assuming a good deal when you think I can interpret the law?

Q. I appreciate the difficulty that——

A. I mean after all I am just a physician and not trained in legal phraseology.

Q. You are not having any more trouble getting the legal phraseology than we have had in getting the medical phraseology that goes with this problem. (Hands document to the witness.)

A. Mr. Daugherty, as I understand it you are connected with the State District Attorney's office?

Q. Mr. Harkin is the Assistant Attorney General of the State of Oklahoma.

[fol. 556] A. I see. Could you tell me what the provisions of Chapter 11 or Chapter 13, Title 15——

Q. Chapter 11 is the Medical Act governing the practice of medicine in Oklahoma, and 13 is the Optometry Act governing the practice of optometry in Oklahoma.

This bill, and I should have stated this to you, Doctor, is not an Optometry Act and it isn't a Medical Act. It is entitled the Sale of Optical Goods Bill.

A. Yes.

Q. It has a provision in there that it is cumulative though to any of the six Acts in Oklahoma pertaining to the healing arts, which includes medicine, osteopathy, optometry, chiropody, dentistry and chiropracty.

A. Yes.

Q. Those are the six healing arts in Oklahoma, and that bill is cumulative.

A. Well of course right off, here, in Section 2—and I am asking for information only.

Q. Yes?

A. In Section 2, that would indicate, let's say, it shall be unlawful for any person, firm, corporation or company [fol. 557] or partnership not licensed under the provisions to fit——

Q. 11 and 13. That means anybody not a physician or an optometrist.

A. Yes. To fit, adjust, adapt or in any similar manner apply lenses. That means that it is unlawful for an optician——

Q. No.

A. ——in Oklahoma to fit them?

Q. If you continue reading, then you see down here it says "except," about half way down.

A. I see.

Q. In other words unlawful for any person not so licensed to do that, except persons licensed under 11 or 13, may in a written prescription authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense or adjust such lenses, and says may continue to do that.

A. Well that is the thing I wanted to be quite clear in my mind about, you see.

Q. That is exactly as I told you, that it does not, that this bill in our opinion does not put the dispensing opticianer out of business.

[fol. 558] A. In Section 4 do I understand that that would prevent a group of physicians who had an opthalmologist in their group from employing an optometrist to dispense their glasses?

Q. I wouldn't construe it that way at all, no, sir. In other words that is a strict employee-employer relationship between——

A. Of the medical group?

Q. ——between the professional men and a commercial or lay group.

You see that is stated one way, and then turns around and states it the other.

In other words it says unlawful for any optometrist or physician to make an eye examination as an employee of a person, firm, corporation, lay body, organization, group or lay person, and likewise unlawful for any lay body and so forth to make an eye examination through the means of engaging the services on a salary.

To answer your question I will give you my opinion that it does not, would not prevent an arrangement such as you have described.

Mr. Branton: I would like to interpose a comment here that the purpose of this lawsuit is to attempt to interpret [fol. 559] that law, sir.

Now you have heard an interpretation placed on it by counsel for the State of Oklahoma. We of course have a contrary interpretation which will be placed on there.

The Witness: I see. Just one thing that occurs to me, and again I want to emphasize I am not interested in either side, would this prevent a patient who had a prescripttion of mine filled, and the optician gave him a copy of that prescription, would it prevent him from furnishing a copy of my prescription some time if he had his glasses broken, to have his lens replaced?

Mr. Daugherty:

Q. The patient?

A. Yes.

Q. No. Not in my opinion, no, sir.

Doctor, may I ask you if you are aware of the fact that this measure has been approved by the ophthalmologists of Oklahoma at the time of its passage?

Mr. Phillips: We object to that. That is not in evidence.

The Witness: No. I am only aware of the fact that one of the ophthalmologists that I have a great deal of re- [fol. 560] spect for didn't like it very much.

Mr. Daugherty:

Q. I am just asking you if you are aware of the fact——

A. No, I am not.

Q. ——that the Oklahoma Medical Association, representing the ophthalmologists of Oklahoma, found this bill to be satisfactory to them.

A. No, I am not.

Q. Are you also aware of the fact that the attorney for the Executive Council of Oklahoma Medical Association collaborated in writing this bill?

A. No.

Mr. Branton: Excuse me, before we get to that one may we have the bill marked as an exhibit to this deposition?

Mr. Daugherty: I think let's agree that it is the bill that is involved. I don't think there is any need of spending——

Mr. Phillips: It is an accurate copy?

Mr. Daugherty: That is right.

The Witness: This is an accurate copy?

Mr. Phillips: I don't know anything about it. I don't know anything about, it sir. This is something we haven't seen.

[fol. 561] Mr. Daugherty: This is for the doctor's——

Mr. Branton: Just a moment. We are asking—I would like to have it marked, if you please.

Mr. Daugherty: Q. Now, Doctor, you are testifying here under subpoena by the plaintiff in this lawsuit?

A. That is right.

Q. Are you familiar with——

Mr. Branton: Excuse me just a second.

Mr. Daugherty: Q. ——with the owners of Lee Optic Company? Do you know them?

A. No, sir.

Q. Do you know anything about them?

A. Only hearsay.

Q. Do you know Shanbaum? Carp?

A. No, sir.

Q. You don't know any of those individuals?

A. No, I don't.

Mr. Branton: I would like to object to this line of questioning on the ground that no individual is involved in this lawsuit.

Mr. Daugherty: You can object at the time they are introduced in evidence.

Mr. Branton: All right.

Mr. Daugherty: And I am going to object to your making [fol. 562] any more objections when I am examining the witness. Do it at the time of trial.

Mr. Branton: I would like it marked if you will, please for identification.

(Whereupon said document was marked Plaintiffs' Exhibit number 1 for identification as of 10-15-53.)

Mr. Daugherty: Q. Doctor, as an ophthalmologist you are more or less an expert in the field of visual care, are you not?

A. Well I at least have had some training in it.

Q. I believe everyone in this lawsuit will agree that you are an expert in that field, and I think all of us would be interested in hearing what you have to say as to whether or not certain provisions which the legislature of Oklahoma has seen advisable to embody in the laws of that state are good for the visual care of the citizens of Oklahoma, or any state for that matter, good for public health and good for good eyesight, so I would like to ask you if this is a good law when it provides that unqualified people should not be permitted to visually correct the eyes of another and further provides that in Oklahoma examinations for [fol. 563] eye glasses should be made only by licensed qualified ophthalmologists and optometrists [illegible] wrong with those laws?

A. No, sir, that provision I would say was——

Mr. Branton: By examination for eye glasses do you mean examination for lenses?

Mr. Daugherty: I mean examination for eye glasses.

The Witness: Yes, sir.

Mr. Daugherty: That is what the law says.

The Witness: That is what we are discussing.

Mr. Daugherty: That is right.

The Witness: Yes, sir.

Mr. Daugherty: Q. That in the public interest it is good for public health, isn't it?

A. That part I would agree to, yes, sir.

Q. Do you believe that eye examinations conducted by ophthalmologists or optometrists should be done professionally?

A. Well again, from the legal viewpoint, exactly what do you mean by professionally?

Q. Well if a client comes to an attorney there is established a confidential professional relationship. You understand that, do you not?

A. Yes.

[fol. 564] Q. If a patient comes to a doctor there is established a professional confidential relationship?

A. That is correct.

Q. When someone comes to either a physician or an optometrist with defective vision and needs his eyes corrected by glasses, isn't that being done on a professional basis just as if he would come to a doctor with a broken leg?

A. Well speaking for ophthalmology I would say yes. I don't know that I am qualified in optometry, because that entire picture, as you know, is changing.

Q. Yes?

A. There still are men who set—or there are a newer group who set themselves up as professional men, and there still are many of the others who do not, so I don't feel qualified to answer that part of it.

Q. You consider eyesight as a very precious thing, do you not?

A. Quite obviously.

Q. And you consider defective eyesight as a bodily ill?

A. Not necessarily. Can be the result of a congenital [fol. 565] malformation.

Q. Well——

A. A bodily defect I would say.

Q. Well, a bodily defect.

A. Yes, sir.

Q. Again then do you feel that if someone has defective vision that needs to be corrected, that that should be done professionally as being opposed to being done commercially?

A. Well of course that brings up again the situation in optometry that there are, and you know that just as well as I do, that there are still many people, many optometrists who are licensed to examine eyes, who are doing it on a commercial basis, and that it has only been recently that they have been attempting to get away from that.

Q. Well I am just asking your opinion as to how you feel it should be done.

A. I feel it should be done professionally by properly qualified and properly trained individuals.

Q. That is exactly——

A. That is, for the examination itself.

Q. That is right, it should be done professionally?

A. That is right.

[fol. 566] Q. And is there anything wrong with the law that attempts to bring that about in Oklahoma?

A. No.

Q. Do you think that such a law is good for the public health and good for the citizens of the state?

A. If it contains a provision, that particular provision would be good for the public health, yes, sir.

Q. Do you feel that there is anything wrong with the provision of this law that provides that if a patient comes to a physician or an optometrist with defective vision, and the professional relationship is created, that that professional man should not be fully responsible for the care of that patient that he undertakes?

The Witness: Would you mind reading that again?

(Question read by the reporter.)

The Witness: A. No I don't agree to that.

Mr. Daugherty: Q. In other words——

A. A patient may come to an optometrist with defective vision as a result of glaucoma.

Q. I see your point.

A. And the optometrist certainly isn't qualified to take care of that.

[fol. 567] Q. I see your point.

A. Yes.

Q. And I think you raised that a moment ago.

A. That is right.

Q. But let's understand that optometrists do not treat diseases of the eye.

A. I wish that were true.

Q. But merely make eye examinations.

A. I wish that were true.

Q. Well, let's assume that that is true.

A. Now if that is assumed——

Q. And with that in mind, what I am trying to get your opinion about, Doctor, is if you don't adhere to the principle of professionalism that requires that once that relationship is established that the professional man is responsible.

A. Well of course your question would intimate that you are going to hold the optometrist responsible for things which he knows nothing about, because your statement is very broad on that.

Q. We are confining, now we are confining his efforts to eye examinations. In other words, if he undertakes to make an eye examination he would be held responsible?

[fol. 568] A. Well let's change that term to refraction so we know what we are talking about.

Q. Very well.

A. See, after all I work with the academy, I have no interest on either side, but I don't want to be misconstrued.

Q. Yes?

A. I understand that this may go to the Supreme Court, and it happens that two of the justices are personal friends, and I don't want anything misinterpreted.

Q. One of them being a recent appointment I take it?

A. Yes, and the other one for some time.

Q. Doctor, my question isn't intended to be technical,

and it isn't intended to be particularly difficult, but I am merely asking you in your opinion as a professional man if you feel that once the professional relationship is established between doctor-patient, that the doctor is responsible for what he undertakes to do?

A. Well I think that is the interpretation of most of them.

Q. Well is that your opinion that that is good professional practice?

[fol. 569] A. Yes.

Q. Then if that is what this law means, is there anything wrong with that provision of this Act?

A. No, I see nothing wrong with that provision.

Q. As a matter of fact don't you find it very beneficial to the people to know that once they go to a professional man with some bodily ill, that that professional man is responsible for that patient's welfare in that connection?

A. Of course that is assuming that he is doing it to the best of his ability.

Q. Yes, sir.

A. And we all realize that the ability varies tremendously.

Q. Of course.

A. Now some men can do what they feel is the best thing, and it still may not be adequate.

Q. Of course.

A. Yes.

Q. That is understood. Doctor, do you find anything wrong with this bill, considering the public health and the public welfare, when it authorizes optical suppliers to interpret prescriptions and then fit and adapt glasses, provided they have prescriptions from either a physician or [fol. 570] an optometrist?

A. Well would you define optical suppliers, please?

Q. That could be defined as a dispensing optician, or any similar person.

A. In other words, a retail dispensing optician?

Q. Yes.

A. Would be considered qualified to fill a prescription?

Q. Well it doesn't say he is qualified, but this law authorizes.

A. Would be permitted to?

Q. This law authorizes an optometrist or ophthalmologist

to give a written prescription.

A. Yes.

Q. To an optical supplier. That is the verbiage of the bill, Doctor.

A. Yes, sir. That is why I wanted to clarify it.

Q. To an optical supplier. I think we will all admit that would include dispensing optician. To get the prescription and then let him interpret that prescription and then fit and adapt the glasses to the face of the patient.

A. That is right.

Q. Is there anything wrong with that provision of the [fol. 571] Act?

A. No.

Q. Doctor, you of course belong to the American Medical Association, do you not?

A. That is right.

Q. You are familiar with the principles of medical ethics?

A. Yes, sir.

Q. Do you feel that ophthalmologists should advertise?

A. No, I don't.

Q. Do you believe that optometrists should advertise?

A. I don't feel that I am in a position to judge their ethics. I mean that is something that——

Q. Do you feel that ophthalomologists should advertise?

A. No. I certainly feel that they should not.

Q. Do you think that in the field of visual care that regulations which protect innocent members of the public by prohibiting bait advertising and other forms of advertising for sale of glasses is good for the public health?

A. Yes, I do.

Q. And public welfare?

A. I do.

Q. Doctor, you feel that eye examinations and the sale [fol. 572] of glasses should be handled by qualified people on a professional basis?

A. That is right.

Q. Doctor, you feel that if a person has defective vision, that he should start in in the office of a qualified eye examiner, either an ophthalmologist or an optometrist?

A. I would qualify that by saying that I feel that such a man should be examined.

Q. Yes?

A. By a qualified ophthalmologist or optometrist, yes, sir.

Q. Do you think that laws that prohibit advertising which would cause innocent members of the public to go somewhere else in search of eye glasses is a good law for the public?

A. I would say that such an Act that would prevent that, would be good.

Q. You feel that is for the protection of the public?

A. Yes, sir.

Q. Do you feel that it is good for the public health and the public welfare for a law to provide that it is unlawful for physicians or optometrists to receive rebates or kickbacks from any optician?

[fol. 573] A. Yes, I do.

Q. Do you think that professional people should have business solicitors?

A. No, I do not.

Q. Do you find anything wrong with the provision of this law which makes it unlawful for any optometrist or physician to allow or permit someone selling optical goods to solicit business for them?

Mr. Brantou: I object to the form of the question.

Mr. Daugherty:

Q. You are familiar with that provision in this law which you just read?

A. Yes.

Mr. Brantou: Excuse me just a second. Will the record show that the doctor, Dr. Cordes, the witness, spent approximately seven minutes in looking over the law, and that this is the first and only time he has ever seen it.

That is correct?

The Witness: That is right.

Mr. Daugherty:

Q. Did you understand my question, Doctor?

The Witness: No. I would like to have you ask that again, please.

Mr. Daugherty:

Q. You have already testified that you do not feel that [fol. 574] professional men should solicit business.

A. That is right.

Q. And I am merely asking you if you think this is a good provision of the law when it provides that these professional men making eye examinations should not permit anyone selling optical goods to solicit business for them.

A. Of course that is a technical question that is a little difficult to answer, because it involves custom in certain localities.

In the State of California the optometrists originally made it very difficult for the opticians. As a result the opticians were taken in under the law of the Board of Medical Examiners, or under that group, and it is customary for the opticians, who make no examinations for eyes, but merely fill prescriptions, that they do have advertising in their windows, little signs "Consult your ophthalmologist regularly," or something of that sort.

Now that is customary in our state, and apparently is approved.

Q. I hope you are not confused between solicitation of business——

[fol. 575] A. Well——

Q. —and a referral to someone, to some professional person.

A. That of course is a difficulty, that I am trying to interpret legal terms that I am not familiar with.

Q. I know it, and I am trying my best to help you to understand.

A. If you mean that do I object to Bill Jones making it a point to solicit business for Dr. X, then the answer is yes.

Q. You feel that he should not solicit business for a professional man?

A. He shouldn't be soliciting business for a special group or a special man, that is right.

Q. And if Mr. Jones happens to be selling optical goods, you still feel he should not solicit business for either an optometrist or ophthalmologist?

A. He should not solicit, that is right.

Q. You feel that that provision of the law is good for the public welfare, public health?

A. Yes. Of course as I understand it, if somebody comes in and asks Mr. Jones, "Do you know a good optometrist?" and he says, "Why yes, I know Joe Smith over here is all [fol. 576] right," I would see no objection to that.

Q. That is what I meant by referral.

A. Yes.

Q. It was stated eye examinations should be conducted on a professional basis, and people making them being professional people should act as professional people in accordance with the professional ethics.

A. Well that applies to medicine. I am not qualified to state——

Q. To ophthalmologists?

A. That is right.

Q. And you do not feel that they should solicit business?

A. That is right.

Q. Under your principles of your ethics?

A. That is correct.

Q. You find no fault with that provision of this law then, I take it?

A. I do not.

Q. Now again in connection with your feeling that care of the eyes should be done professionally, do you feel that it is good for the public welfare and the public health for this law to make it unlawful for any physician or op- [fol. 577] tometrist to make an eye examination as an employee of some lay group or lay body or commercial house, or do you think that they should make their examinations as a professional without commercial influence?

A. I don't think I am qualified to answer that question one way or the other. I mean that involves a lot of——

Q. Do you have an opinion about it, Doctor? May I give you the information that this was the question of whether or not eye examinations should be done under professional responsibility and direction, or whether the responsibility and direction should be controlled by commercial interests.

Mr. Phillips: Excuse me, do you mean your question is directed to that?

Mr. Daugherty: That is an explanation of my question.
Mr. Phillips: Of your question?
Mr. Daugherty: Yes.
Mr. Phillips: Yes.

Mr. Daugherty:

Q. I am aware of the fact, Doctor, you are not the legislature of Oklahoma.
[fol. 578] A. That is right.
Q. But now you are a professional man practicing ophthalmology, and I would like your opinion as to whether or not you think it is good for the public——
A. Well I would like to——
Q. —a law that provides that eye examination should be done professionally, rather than commercially.
A. Well that is purely a question of ethics of an individual group. I don't think it makes any difference as far as the patient is concerned how he does it, as long as he has been properly trained and qualified and makes a careful examination. I don't think that that is within my province to answer that question either way.
Q. Well are you aware of the situations where commercial interests have hired professional people on a salary, put them up in business and required them to make certain charges and make so many examinations, and that regardless of the patient's needs and requirements, and have permitted commercialism to overshadow and control professionalism on the part of these professional people? Are you aware of such situations as that existing throughout [fol. 579] the country?
A. Yes. I understand that the Permanetti Hospital in California is run on that sort of a basis in which these doctors are hired.
Q. This law has an exemption about hospitals, Doctor, and I am not talking about hospitals.
A. Well, this is not a university hospital, of course.
Q. Yes?
A. It is a private hospital, and it brings up the problem of an individual going into the medical business, because Henry Kaiser is not a doctor, he is a layman, and I am not qualified to answer that question. That is beyond me.

Q. You don't have an opinion on it one way or the other, is that it?

A. I don't approve of it, but I don't think that I am qualified to answer it.

Q. You do not approve of it?

A. No, I do not.

Q. Why do you not approve of it?

A. Because my personal experience is—and I speak only of my personal experience—that the patients that I have seen from this particular hospital, as an example, have not [fol. 580] received what in my opinion would be the proper care, and I am expressing purely my opinion.

Q. Do you think then, based on your opinion and your experience, that any law which tends to restrict eye examinations to pure professional relationships is a good law for the public health and public welfare and people of the state?

A. You are asking me a lot of legal questions, aren't you? Oh boy.

Mr. Daugherty: Would you mind reading that question to the doctor?

The Witness: Here is what I mean, after all I don't think that I am qualified to answer that.

Here we have for example—and I know what you are getting at—we have a large department store in San Francisco. It is one of our very reputable firms. They have in that store an optometrist who is an extremely well qualified optometrist, a very ethical man, who does very nice work, and I have seen patients that have had diseases that happened to come to me, weren't sent to me by him, but happened to have come to me, and I have seen the work he has done and I think he is taking very good care of those [fol. 581] patients, and know, I mean I don't know that I am qualified to say whether—I can't say that those people are getting poor care, because in that particular instance they are getting good care.

Mr. Daugherty:

Q. But you just recited another instance where they weren't getting good care.

A. That is right. That is why I don't think I am qualified.

Q. Under commercial control.

A. That is right.

Q. Do you think that a law is a good law which prohibits some of these improper things that you have seen in your own experience, and protects the public in that connection?

A. I think that any law that legitimately protects the public is worth while.

Q. With reference to the care of their eyes?

A. Yes, sir.

Q. In that same connection, Doctor, do you think that it is good for the public and protection of the public in the care of their eyes where a law provides that no retail merchandising establishment shall rent space or sublet departments to physicians or optometrists or people giving eye examinations?

[fol. 582] A. I don't think I can honestly answer that, because after all this example I gave, I can't see how there can be any objection to this man setting up what after all amounts to a professional office, because it happens to have a certain space within this store.

I mean that is a question for the optometrist to answer, what they consider ethical on that, but as far as the eye care is concerned, that individual that goes to this particular man is getting good care in my opinion.

Another patient who is going to this other group, which would be the type of thing that you would approve, is not getting good care.

Q. Now, Doctor, you are thinking about one isolated instance in San Francisco.

A. That is right, and there must be comparable instances elsewhere, you see.

Q. Yes. Now you have already testified that you think eye examinations should be conducted on a professional plane.

A. Well you are attempting to define what optometry considers a professional plane, because I know that that is understood; and I don't know.

[fol. 583] Q. Well——

A. But speaking for ophthalmology alone, that is all I am qualified to answer. I would say that as far as ophthalmology is concerned it is on a professional basis.

Q. And should be conducted on a professional plane?

A. Yes. I make no pretense of being an expert on optometry, and I don't feel that I can answer for them.

Q. All right. Speaking of ophthalmologists then you feel that they should conduct eye examinations on a professional plane?

A. That is right.

Q. Do you think that they should set up their office in a retail department store?

A. I do not.

Q. And do you find anything wrong with this law which makes it unlawful for them to do that?

A. Not that particular phase regarding ophthalmology.

Q. All right.

A. I see no objection to that.

Q. As a matter of fact that is good for the public health and interest and keeps the eye examination on a professional basis, does it not?

A. Speaking of ophthalmology, yes, sir.

[fol. 584] Q. And would eliminate subterfuges and other means of commercial interests taking over control of professional eye examinations?

A. Well let's say again taking over the examinations by the ophthalmologists, and I will say yes.

Q. Yes, sir. Now that is fair for the ophthalmologists?

A. Yes.

Q. And we agree with you a hundred per cent. Now is there any reason why the optometrists should not be likewise restricted?

A. I don't feel qualified to answer that because as I have stated before their whole code of ethics is undergoing a change. I don't know what they consider good ethics in Oklahoma, and therefore I can't answer that.

Q. Do you have an opinion as to whether or not optometrists making eye examinations should not be likewise restricted?

A. My opinion is this, that probably during the course of the next ten or fifteen years that will be true. At the present time it certainly is not true, as I understand it, as far as ethics are concerned. I think that in the future [fol. 585] it probably will be.

Q. Are you talking about the State of California now?

A. No. I am talking about the United States.

Q. Well now you understand, do you not, that these optometrists are regulated in the various states in accordance with state laws?

A. That is right.

Q. And this is a state law that we are discussing with you here today, Doctor.

A. Yes, I know, but I am not qualified.

Q. If it is held constitutional it will govern not only the opthalmologist about which you testified, but likewise the optometrist.

A. Yes.

Q. My question to you, as an expert in the field of visual care, if that isn't a good provision for the protection of the public, to see that eye examinations by any person are conducted on a professional basis without commercial domination.

A. Well I certainly will answer that as I did before, that as far as opthalmology is concerned, which is the one thing I know something about, I would say yes.

Q. Do you see any reason why an optometrist should [fol. 586] not be likewise restricted?

A. I am not qualified to answer that. I really cannot.

Mr. Phillips: Excuse me just a moment.

Mr. Daugherty: Off the record.

(Discussion outside the record.)

Mr. Daugherty:

Q. I believe that covers the bill, Doctor, provision by provision.

A. All right.

Q. As I see it.

A. All right

Mr. Daugherty: Let me thank you for your patient response to my questions, and I know that we had a little trouble understanding each other, you being a medical man——

The Witness: That is right.

Mr. Daugherty: —and I being a lawyer, but I believe that we have a better understanding.

Mr. Phillips: Doctor, let me ask you just one or two questions.

Redirect examination.

By Mr. Phillips:

Q. First, will you state for the record what you consider [fol. 587] to be the practices of ophthalmologists and opticians and their relationships one with the other which are in accordance with the type of ethics, professional ethics which you are approving here.

Have I made my question clear? I would like you to reiterate for the record how in your judgment the professional practice of ophthalmology and the proper practice of opticianry, as they relate to the various functions of each, are properly carried out.

A. The ophthalmologist makes his examination, and I am speaking again of refraction, determines what the prescription for the patient's eye glasses should be, he writes out that prescription, hands it to the patient, usually asks the patient where he is going to take it, because it is important that we know they go to reliable places, and if they go to any one of a number of people that we feel are reliable, we say quite all right.

If they ask if we have any recommendations, we will mention two or three firms that we feel are reputable, tell them they can take it to any one of these firms.

[fol. 588] The patient takes that prescription to this optician, tells him or picks out from a display cabinet the type of frame that he likes, the optician then has to pick out the frame of that particular variety that fits his face, and he then makes the measurements for the pupillary distance, the distance of the lens from the eye, has the lens ground, or grinds it himself, depending on the size of the establishment, puts it in the frame, the patient comes back and has the frame adjusted, and then is supposed to return to the ophthalmologist, who checks the lenses on a lensometer to be certain that they are correctly made, and then sees that the frame fits properly.

Q. I think that materially clarifies the situation, Doctor. Let me ask you one question further on this subject. In your judgment would it be proper for an ophthalmologist to specify to his patient that that prescription be filled in a specific opticianry, assuming that there were a group of qualified opticianry establishments available?

A. I don't think it is a proper thing to do. I feel that the patient should be assured that the optician that he is [fol. 589] going to take it to, in the mind or in the opinion of the ophthalmologist is a reputable firm.

I don't think he should go any further than that unless he is asked, and then I see no objection to him recommending two or three firms.

Q. On a referral basis?

A. On a referral basis, which in his opinion are reputable firms.

Q. One more question, Doctor. You stated that in the State of California there are certain optician establishments which had modest window displays and modest forms of advertising. Do you find that kind of advertising by opticians objectionable and not to the best interest of the public?

A. No, I see no objection to [illegible] type of advertising. I do object to some of this advertising we see with neon signs and full page ads.

Q. All right.

A. And things of that sort.

Q. You have stated that you object to misleading advertising, or I think bait advertising.

A. That is right.

Q. That kind of advertising.

[fol. 590] A. That is right.

Q. Let me ask you one further question on this subject. Do you believe that it is contrary to the best interest of the public and their health and welfare for competent opticians to insert accurate advertisements in telephone directories announcing that they are opticians and are available for the filling of written prescriptions?

A. I feel that is within the province of the code of ethics of optometry.

Q. Yes, sir.

Mr. Phillips: That is all of the questions.

Mr. Daugherty: Doctor, let me ask you a question in that connection.

The Witness: Surely.

Recross-examination.

By Mr. Daugherty:

Q. If you should find that a window display was the means of enticing the public into an establishment where they were given improper eye care, would you be in favor of seeing to it that those people weren't permitted to make such window displays, in the interest of public health?

[fol. 591] A. You mean by improper, unskilled examinations?

Q. Yes.

A. Of the eye?

Q. Yes.

A. Yes, sir.

Q. As an example, if large window displays are made which entice the public into an optician's place of business, and once in there he sends the man to an osteopath for the eye examination, a person unqualified in Oklahoma—I don't know the status in California——

A. No, we have some darn good osteopathic eye, ear, nose and throat men in the state.

Q. That is an example of unqualified examination.

Mr. Phillips: Mr. Daugherty, let the record show that the laws of Oklahoma hold an osteopath to be qualified.

Mr. Daugherty: You are just 180 per cent wrong, Mr. Phillips.

Mr. Phillips: All right.

The Witness: In the State of California they are qualified.

Mr. Daugherty: Not Oklahoma.

The Witness: And they have their own examining board.

[fol. 592] Mr. Daugherty: This is off the record.

(Discussion outside the record.)

Mr. Daugherty:

Q. I believe you got the question, my question, if it is that means of advertising which in your judgment would bring about improper eye care, you would be in favor of restricting it?

A. That is right.

Q. And that applies not only to window displays but newspaper ads and television ads, telephone directory ads?

A. Any kind of ad that is misleading.

Q. That is right, and any kind that brings about improper eye care to the detriment of the public?

Mr. Phillips: I believe the witness has answered the question.

Mr. Daugherty: I think he answered. You may strike that.

The Witness: All right.

Mr. Phillips: You have a right, Doctor, to read this deposition and sign it, or you may waive the reading of it, and the court reporter will submit it as it is.

Do you wish to read the deposition?

The Witness: No. I think, or at least I tried to be care-
[fol. 593] ful enough that I don't think I need to read it.

Mr. Phillips: Very good, sir.

(Signature waived.)

[fols. 594-595] Certificate of Notary Public to Deposition—(omitted in printing).

[fols. 596-599] Copy

EXHIBIT 1 TO DEPOSITION

The Oklahoma State Medical Association
219 Plaza Court
Oklahoma City 3, Oklahoma

May 11, 1953.

Rep. Paul Harkey,
House of Representatives,
State Capitol Building,
Oklahoma City, Oklahoma.

DEAR REPRESENTATIVE HARKEY:

You have asked for the stand of the Oklahoma State Medical Association concerning House Bill 953, as amended, which recently passed the House of Representatives.

While there was some discussion with regard to Section 2, the bill is satisfactory to us as passed by the House.

Sincerely, Dick Graham, Executive Secretary.

DG:mo.

[fol. 600] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

DEPOSITION—October 15, 1953

[fol. 601] DR. WILLIAM L. BENEDICT, called as a witness by the plaintiffs, having been first duly sworn on oath, was examined and testified as follows:

Direct examination.

By Mr. Phillips:

Q. Will you state your name, sir?
A. William L. Benedict.
Q. What is your profession, sir?
A. I am a physician and surgeon.

Q. Will you state the degrees you hold?

A. I hold a degree of M. D.

Q. Will you state the professional associations or societies of which you are a member, and any offices which you may hold therein, and any committees of such associations or societies of which you are a member?

A. I am executive secretary treasurer of the American Academy of Ophthalmology and Otolaryngology. I am the president of the American Ophthalmological Society. I am a member of the House of Delegates of the American Medical Association representing the section of opthalmology. I am a member of the American Medical Associa-[fol. 602] tion, of course. I am a member of the American College of Surgeons; an honorary member of the International College of Surgeons. I think that is sufficient.

Q. All right, sir. Will you state the history of the practice of your profession, sir?

A. You mean the history of my participation in the practice?

Q. Yes.

A. Following my graduation from the medical school, I was first intern and then assistant and instructor in the Department of Ophthalmology at the University of Michigan for two years. I was three years in private practice in Fresno, California, my practice limited to ophthalmology and otolaryngology.

On April the 1st, 1917 I went to Rochester, Minnesota as head of the Department of Ophthalmology.

Q. Of what institution, sir?

A. The Mayo Clinic.

Q. Mayo Clinic.

A. I was Professor of Ophthalmology of the University of Minnesota on the Mayo Foundation, at the Mayo Clinic [fol. 603] at Rochester, Minnesota from 1917 through 1950.

In 1950 I retired from the Mayo Clinic and from active practice of ophthalmology.

Q. And what have you been doing since 1950, sir?

A. Devoting my time to work as secretary of the American Academy of Ophthalmology and Otolaryngology, and at the present time the additional work as secretary general

for the Seventeenth International Congress of Ophthalmology.

Q. Are you a member of the committee on interprofessional relations?

A. No, I am not.

Q. Are you a consultant to that committee?

A. Not so designated. I am familiar with the activities of the committee, and have sat in on many of their conferences, but I have no appointment as consultant or a member of any of the committees.

Q. Have you been active in the work of the American Medical Association in the fields of interprofessional relationship of ophthalmologists, optometrists and opticians, sir?

A. We have no agency for active participation in work of that kind under the aegis of the section of ophthalmology of the American Medical Association, and only as a delegate [fol. 604] representing the section on ophthalmology have I had anything to do with problems concerning the relationships between the three groups that are interested in visual care, namely ophthalmologists, optometrists and opticians.

Q. As a delegate have you had personal experience in that field and in dealing with the people who were concerned with the problem?

A. Yes. I was directed by the executive committee of the section of ophthalmology to present to the House of Delegates a resolution which in effect reestablished a better working relationship between the members of the American Medical Association and other persons who were interested in the general field of public health.

Q. Have you had occasion in the course of that work to ascertain the opinions of leaders of optometry as to the correct interprofessional relationship?

A. I have discussed the effects of this resolution personally with a few optometrists, but the resolution was published in the journal of the American Medical Association, and in probably some specialty journals, and the results of [fol. 605] my efforts to bring about better working relations between optometrists and ophthalmologists—well, the American Academy of Optometry made me an honorary

member of their society and gave me a special certificate as an award for that specific work.

Q. Are you familiar with the view of the American Academy of Optometry in the field of interprofessional relationship in general?

A. Rather generally I would say. I haven't paid much attention to the part of their magazine that has to do with the interprofessional relations.

I have talked with some of the officers of the academy, and also of the American Optometric Association informally, and I feel that the very fact that they made me a member of the society was an expression of their appreciation of my efforts to take care of their own problems without having to live under restrictions that might be imposed by resolutions or organized bodies such as were carried by the American Medical Association for several years.

Q. Are you familiar with the Board of Opticianry?

A. Yes.

[fol. 606] Q. Did you have any part in the establishment of the Board of Opticianry?

A. Yes, I did.

Q. Will you explain your part in the establishment of that board?

A. Yes. The Board of Opticianry was established to examine and certificate students of opticianry who were taking special courses in the Junior College of Rochester, Minnesota.

That was the first school of its kind that was established, and wishing to put it on a nationwide basis, as other schools of its same type we knew would be formed, we felt it advisable to have a national examining and certifying body, and that was established, and the board I think is incorporated and well recognized as a competent examining and certifying board for students of opticianry.

Q. From your experience in these various activities are you familiar with the general field and methods of practice of ophthalmologists?

A. Well, not from that experience. My acquaintance with ophthalmologists over the country and my interest in educational activities has led me to become as familiar with [fol. 607] practices I think as most anyone could be in a broad general sense.

Q. Do ophthalmologists issue prescriptions for eyeglasses?

A. Most ophthalmologists do refractions, it is part of their work as an examiner and consultant, and if glasses are required to correct a condition of a patient the ophthalmologist writes a prescription for glasses to correct the refractive error. That is all glasses do, of course, is to correct errors of refraction.

Q. Does the prescription of the ophthalmologist contain the necessary data with respect to lenses?

A. Yes.

Q. What other data does it contain, sir?

A. They have specifications for the placing of the lenses before the eyes with regard to their distance that the lens should rest in front of the eye, the angle at which it is held in the frame, the adjustment of the two lenses so that they will properly neutralize the effect on the two eyes in relation one to the other, and to do that they have several ways of implementing their specifications, and in some instances they may go so far as to specify the type, kind and size of a [fol. 608] frame that is to be used.

That is particularly necessary in prescribing glasses for welfare cases where the accounts are paid out of public funds, and the type of frame is particularly important from the standpoint of strength and durability, and that standard frame, as we might call it, is specified by the ophthalmologist, or whoever else writes the prescription; so that the degrees—I mean the amount of specifications that appear on any prescription vary with the needs of the case as the ophthalmologist appraises them.

Q. You have described one situation in which an ophthalmologist would specify the type of frames. What other types of situations might be involved in his specifying a type of frame in his prescription?

A. Well, some patients may need such a specific application of the lenses that the ophthalmologist would request a specific type of appliance.

For instance a person who is to wear the optical correction may have a head of such shape that in order to hold the lenses in the proper place specific instructions must be given. [fol. 609] Also specific instructions are given for the size

and shape of lenses to be worn as a protection in industrial plants, such as goggles, filters, hardness of lenses.

Of all the many things that can be done to lenses to make them more effective, of which there are many, the ophthalmologist will specify sometimes particularly what should be used, and other times he may specify in a general way the requirements and leave it up to a competent optician to make the adjustments to the best of his mechanical ability.

Q. Are the occasions on which the ophthalmologist determines it to be necessary to specify the kind of frame employed frequent or rare?

A. Well, I think it is rather rare.

Q. Does the prescription of the ophthalmologist ordinarily contain data respecting the fitting of the frame to the face, other than the data which you have already testified?

A. No, except for unusual cases, that matter of fitting the frames to the face and fitting the lenses properly before the eyes is left to the optician.

Q. I see. Are you in general familiar with the methods [fol. 609a] of practice of optometrists?

A. You mean as to whether or not they dispense their own lenses?

Q. My next question is—strike that.

A. I don't know what you mean.

Q. Are you familiar with the field and practice of optometrists in order that you can testify whether or not optometrists dispense their own eyeglasses?

A. No, I really don't know what the custom is throughout the nation.

Q. Very good, sir. Now are you familiar with the services generally performed by opticians?

A. Yes.

Q. Will you testify of what those services consist?

A. Well, to a great extent they consist in the finishing of ophthalmic lenses according to the specifications that are written on a prescription, the fitting of those lenses in a suitable frame so that they will be effective as desired, and also he is charged with the service of the glasses dispensed, such as keeping them adjusted, making necessary changes in the adjustment of the frames so that the proper fitting can be used to the best advantage.

[fol. 610] Q. Do opticians customarily duplicate lenses?

A. Oh, yes.

Q. Do opticians customarily mount lenses in frames?

A. That is their business, and they do it.

Q. Do they customarily dispense frames to their customers?

A. Yes.

Q. And you have already testified I believe that they customarily fit the frames to the face of their customer?

A. Yes.

Q. Is that correct, sir?

A. Yes.

Q. Now, sir, will you state whether or not in your opinion an optician must have the training and educational background of an opthalmologist in order competently to perform the services you have described?

A. (No answer.)

Mr. Phillips: Will you read that question to the Doctor.

(Question read by the reporter.)

The Witness: A. Not at all.

[fol. 611] Mr. Phillips: Q. Will you state whether or not in your opinion an optician should have training and skills different from that customarily given or obtained by ophthalmologists in order to competently perform?

A. Certainly. That is why we felt that we must establish a school for opticians, because the number of competent opticians should be increased to give the ophthalmologists better service.

Q. Will you state whether or not in your opinion an optician must have the training and educational background of an optometrist?

A. No, not at all.

Q. Very good, sir. From your work in this general field, Doctor, are you familiar with the antecedents of optometry and opticianry to the extent that you could testify of your knowledge whether opticianry is an old art?

A. No, my knowledge on that is too vague.

Q. I see, Doctor.

A. Too vague to document. I have a general idea of the development of opticianry as a specialty, and I would say

that it is, as we understand opticianry now in our endeavor to improve conditions, that it is rather recent.

[fol. 612] The only established academic curriculum for opticianry and for opticians was established in the Rochester, Minnesota Junior College, and that same curriculum, with minor variations, has been accepted and is now taught in the junior college at Los Angeles and at a school in Buffalo, New York.

Q. In your experience, however, sir, can you state whether opticians have performed the services which you state have been their functions, for many years?

A. Well, yes, but not as we understand opticians today. The persons who fitted glasses into frames hundreds of years ago were usually artists or mechanics that were also concerned in working with jewelry.

Q. Is it the purpose of schools, the Board of Opticianry, in cooperation with ophthalmologists and others interested in visual care, to establish higher and better standards for the education and training of opticians?

A. That is right.

Q. In your opinion, sir, is the development of greater skill [fol. 613] in the services which you have described as being the services of opticians separate and apart from the development of ophthalmology in the interest of public health and welfare?

A. Yes. The things that are necessary to make fine—to make competent opticians, that work that pertains to the fitting of frames and lenses, is not taught to ophthalmologists in any established school. I mean medical school or college.

Q. Is it your opinion then that in order that those services may be properly performed, a continued effort should be made to increase the education and skill of opticians as a separate field of endeavor?

A. Absolutely.

Q. In addition to the schools that you have mentioned, and the establishment of the Board of Opticianry which you mentioned, are there other efforts being made along that line?

A. Well, I believe, I have been told that in the schools of optometry that are recognized as standard throughout the nation, that as a part of their course of optometry the stu-

dents are given instruction in these matters, frame fitting and adjustment that pertains to opticianry.

[fol. 614] How extensive that work may be, and how many hours they put in probably varies from one to another, and it is a part of their work just as a part of learning refraction is a part of the work of an ophthalmologist. They have in ophthalmological colleges a course of instruction. No effort has been made to train the ophthalmologist or the student in the matters that we now consider pertain to opticianry. I understand, however, that the optometrists do include such courses in their school.

Q. In your opinion, sir, are opticianry licensing—or laws of states licensing opticianry as a separate craft or artisanry in the public health and welfare?

A. I really can't say.

Q. Let me simplify that. Laws for licensing, establishing criteria for education and training before permitting the practice of that.

A. I am not familiar enough with the laws to say whether there are laws. Various states do that.

Q. Would it be your opinion——

A. I have heard that there are laws—pardon me.

[fol. 615] I have heard that there are laws licensing opticians, but I am not familiar with them personally.

Q. You are not familiar with the content?

A. I am not familiar with the content of them.

Q. Would it be in your opinion, however, in the interest of public health and welfare that laws establishing educational criteria and training criteria for the practice of the services which are performed by opticianry be established?

A. That is a debatable question. I think it depends upon the necessity of having laws that make people stay within certain limitations that are prescribed by law. That doesn't necessarily mean that they are right and they couldn't better be done some other way.

That is why we have, I think, so many differences of opinion on laws that put restrictions on the activities of certain individuals, and those restrictions are not based upon merits or the ability of individuals to perform the real service, but probably designed to correct an evil that needs to be corrected to protect the people, but in an interpretation

of the law and its application, some unjust restrictions may [fol. 616] be placed upon individuals that in a way affect the general health of the public or the public welfare.

Q. I see. However, Doctor, if a statute of the nature that I propose, or that I am describing to you, does not attempt to impose restrictions upon the legitimate field of the operation of other professions, but is designed to assure the education and training of persons performing these services of opticians, would you think such a statute would be desirable?

A. Yes. We have many examples of that in our own professional work. Our schools are regulated by law. The ability or the privilege of creating a degree must be prescribed by law.

In every licensing act there are restrictions as well as privileges that are named by law, and fortunately laws can be changed from year to year, and the instructions can be changed according to the needs of the people, and therefore inasmuch as they do serve a good purpose, I think that it is good to have carefully drawn and properly enforced licensing laws.

That is a measure of protection of the public against [fol. 617] abuse, and also permits individuals to exercise in the best way that they can for the general public the efforts of their attainments.

Q. Are you familiar with any efforts of opticians in opticianry to obtain licensing laws, of your own knowledge?

A. Not of my own personal knowledge I haven't.

Q. In your opinion, sir, does the health and welfare of the public require the proper development and protection of all three of the branches which are dealing in visual care, of which you have spoken, that is, opticianry——

A. Yes.

Q. ——optometry——

A. Yes.

Q. ——and ophthalmology?

A. Yes.

Mr. Phillips: That is all, sir.

Cross-examination.

By Mr. Daugherty:

Q. Dr. Benedict, are you appearing here today by subpoena?

A. Well, if this is a subpoena (indicating), that is what I——

[fol. 618] Mr. Phillips: Let the record show——

The Witness: I am here because I was asked to appear, and served with this.

Mr. Phillips: Let the record show——

The Witness: Yes, this is a subpoena.

Mr. Phillips: ——that the doctor is here by subpoena.

Mr. Daugherty:

Q. You were. When were you served with that subpoena?

A. I believe it was yesterday, as I remember, around eleven o'clock yesterday morning.

Mr. Branton: That is right, around between ten-thirty and eleven o'clock yesterday.

The Witness: It is a little hazy in my mind.

Mr. Daugherty:

Q. Doctor, are you familiar with this lawsuit in which you are giving your testimony?

A. I can't say that I am very familiar with it.

Q. Do you know any of the plaintiffs, Mr. Shanbaum, Mr. Carp?

A. I say no, I do not, no. I was trying to think who are the plaintiffs. I don't know who are the plaintiffs and who are the defendants.

Q. Well, you understand that Lee Optical Company and Douglas Optical Company are filing this lawsuit to have a law enacted by the legislature of Oklahoma declared to be [fol. 619] unconstitutional and void?

A. In a general way that is what I have learned. That is what I have been told.

Q. You have learned that. Have you ever read that law?

A. I have read only parts of it hastily.

Q. Who gave you the law to read it, Dr. Benedict?

A. I am not sure that I saw the law, but I saw a comment about it, but probably it contained the law, but I am not sure.

Q. Where did you get it?

A. Some papers that Mr. Phillips showed me, but whether that was a statement of the law or comments regarding the law, at the present time I am not sure.

I was very busy, I wasn't interested, and my mind wasn't on it. I didn't give a hoot, really, at that time, so I didn't pay much attention to it.

Q. Was it represented to you that this law in Oklahoma put the dispensing opticians out of business?

A. I got the impression that some of their activities were curtailed.

Q. In what way were they curtailed?

[fol. 620] A. That they were denied the privilege of exercising certain functions that ordinarily are given to opticians without restrictions.

Q. In what way were they——

A. As it had to do with—they were not able to make certain repairs to frames, lens replacements, sale of additional glasses on the same prescription, among others, without a prescription for that specific service, but with a prescription they could perform that service, therefore they were not put out of business, they were merely restricted in performance of their function.

Q. In other words, they were required to do their work pursuant to the prescription of either a physician or an optometrist?

A. Well, not only that, but they could not perform service for a patient, I will say, without a prescription for that specific service.

Q. Well, I think that is what I just said. In other words, they had to have a prescription from a qualified optometrist or ophthalmologist before they would——

A. As far as that goes, when you qualify that, I don't know who else besides optometrists and ophthalmologists [fol. 621] can give prescriptions.

Q. Yes?

A. That is a matter that you should——

Q. Doctor, have you ever read this bill in its entirety?

A. I don't think I ever did.

Q. Would you like to read it and give us an opinion as an expert in the field of visual care regarding its various provisions, as to whether or not they are for the good of the public health and welfare?

A. Yes.

Q. It would take you a few minutes to read the bill. I think it would be best for you to read it, since you have never read it.

Mr. Branton: Let the record show, please, that I object to this entire line of questioning.

Mr. Daugherty:

Q. This is the bill for the sale of optical goods. It starts right here and comes down to here (indicating).

Mr. Branton: I would like to go a little further and say on the ground that it is the requirement to have the witness evaluate and interpret this statute within a period of a few minutes.

[fol. 622] (Whereupon a short recess was taken.)

The Witness: Well, I think I have spent as much time as necessary on this.

Mr. Branton: Will you let the record show that sixteen minutes were spent in examination of the Act by the witness.

Mr. Daugherty: It is certainly appreciated, Doctor, that this law is couched in customary legal and statutory language, and it is not easy to digest it as it has been condensed, in a few minutes.

May I ask you again if you have any objection to giving us your professional opinion as an expert in the field of human vision as to whether or not certain provisions of this law, if they mean what we think they mean, are good for the public health and the public welfare? Do you follow me on that?

A. Yes. I feel right now that as far as I could make out there are no provisions in the law that would be considered as detrimental to the public health or the adequate

performance of the functions of the services described, but I would like to say that it imposes an imposition on the public and the wearers of glasses by having to be required to [fol. 623] obtain prescriptions for certain services that customarily and perfectly satisfactorily have been performed by opticians all over the country for many years.

Q. What are those services that you mention, Doctor?

Mr. Phillips: Would you like to see the law again, sir?

The Witness: A. "For any services except that specifically excepted by the law," and as I read the law the only service that is exempted specifically is "provided that this section shall not prevent a qualified person from making repairs to eyeglasses."

They don't say eye frames. Do you include frames with glasses in this specific statement?

Mr. Daugherty:

Q. That is a matter of interpretation, and I would say that eyeglasses would certainly mean frames.

A. Well, I would assume that.

Q. That would be my interpretation. Of course, the court will make the final interpretation.

A. Well, we usually refer to eyeglasses as the whole [fol. 624] apparatus, the glasses and the frames in which they set. And any other service that might commonly be performed by an optician is prohibited, except that of making repairs.

Q. Unless the optician has a prescription?

A. Yes.

Q. Do you think that that is for the protection of the public?

A. Not protection. For convenience.

Q. Do you think that it might cure some evils——

A. No.

Q. ——in some cases——

A. No.

Q. ——where glasses may be improperly supplied——

A. No.

Q. ——to the customer?

A. No. It doesn't cure anything.

Q. Do you think that he should go into the store of an optician and be supplied with eyeglasses by that optician without his having a prescription?

A. Under certain circumstances, yes.

Q. I do not have any glasses.

A. All right.

Q. I go to that store.

[fol. 625] A. If you put up enough restrictions to the exception; but the only one that is, I think that is worth considering, is the furnishing of additional glasses, pairs of glasses as we call them, to an individual at his own request, without having to secure a prescription from an optometrist or an ophthalmologist for that specific service.

Q. You find objection to such a prohibition, do you?

A. Oh, my, yes. On two grounds. First, that it is an inconvenience, and it delays the individual from making his purchase, and then second, it impels him to go to someone against his own wishes or desire in order to get a prescription for what he wants, when he has——

Q. Just like it impels me to take a bar examination before I can practice law?

A. It isn't that at all.

Q. The same principle, is it not?

A. Not at all. A similarity to that——

Q. If the public, if the legislature sees certain evils that need to be corrected, and they correct those evils by legislation, I believe you have already stated that sometimes [fol. 626] some good practices have to go by the board in order to protect, and cure the evils, isn't that right?

A. No. I don't think that you have stated it exactly as I had.

Q. I don't believe I did, but isn't that substantially the same purport?

A. I would like to make this—I mean we are probably just getting in an argument on words that don't mean much, but you said that if that legislation——

The Witness: What did he say?

(Question read by the reporter as follows: "If the public, if the legislature sees certain evils that need to be corrected, and they correct those evils by legislation, I believe you have

already stated that sometimes some good practices have to go by the board in order to protect, and cure the evils, isn't that right?")

The Witness: A. In general that statement is true, with some qualifications regarding the admissibility of the fact that the acts of the legislature sometimes do not correct those evils.

Mr. Daugherty: Q. Now, let's assume, Dr. Benedict, that [fol. 627] I have a broken lens, a fragment of it, and I take it to an optician, and I don't have the prescription on that lens. Should he be permitted to duplicate that lens and set it into a frame for me?

A. Yes.

Q. Can he tell the axis on which that lens is supposed to be fitted to the eye by looking at that fragment?

A. If he has a large enough fragment to tell.

Q. Now, if he does not have a large enough fragment?

A. Then he wouldn't.

Q. He cannot tell that axis?

A. Then he wouldn't attempt to fill it.

Q. All right. If he does attempt it, though, Doctor, I am likely to have fitted to my eye a lens that is on an improper axis, isn't that correct?

A. Maybe.

Q. That is what I am getting at, Doctor, when I say that sometimes legislation has to work hardships in order to cure some evils which might happen. You see the point I am trying to make?

A. Yes. I can't ask you questions, can I? You must [fol. 628] state it.

Q. You think this is a good bill then, I take it, Doctor, with the one exception?

A. I have only discussed the first part of the bill. The other features of the bill I think are immaterial to this, as far as I am concerned.

Q. Well——

A. I will give you my opinion on it if you want.

Q. Do you agree it is a good law for the public to prohibit unqualified people from giving eye examinations or visually correcting the eyes of another?

A. Yes, I do.

Q. In your opinion is anyone qualified to make an eye examination and write a prescription for glasses except an ophthalmologist or a physician or an optometrist?

A. No one else is qualified, in my opinion.

Q. Do you find any fault then with the law that prescribes that those are the only people that can do that type of work?

A. No.

Q. You think that is good for the protection of the public? [fol. 629] A. Yes.

Q. You don't think the legislature should let blacksmiths attempt to make eye examinations, do you?

A. That is right.

Q. Is there anything wrong with this law when it lets a physician or optometrist send a prescription for lenses to an optical supplier?

A. I see no objection to that provision.

Q. You think the public is being amply protected?

A. Not necessarily by that provision.

Q. Well, does that provision work to the public detriment in any way?

A. No.

Q. Do you feel that a person who has defective vision and who comes to a physician or an optometrist to take care of that condition, that there is created a professional relationship of doctor-patient?

A. Yes.

Q. Do you think that defective vision should be cared for professionally?

A. Well, let me——

Q. Strike the question. I think I know your objection. [fol. 630] I might be able to get at it in another way.

Do you adhere to the ethical principle that once a professional relationship, a confidential professional relationship is undertaken between either doctor and client or—that is, doctor-patient or lawyer-client, that the professional man involved is responsible for whatever service he undertakes to give?

A. He certainly is.

Q. Do you feel that if someone needs glasses and he goes to an ophthalmologist for glasses, that that ophthalmologist ought to be responsible to see that he gets proper glasses?

A. Yes, that is right.

Q. Isn't it the customary practice of ophthalmologists to have the patient come back with the glasses so that they can check them?

A. Yes, that is right.

Q. Isn't that the ophthalmologist discharging his responsibility to his client?

A. Yes, that is right.

Q. To see that he has got the type of glasses that he ought to have?

[fol. 631] A. Yes.

Q. Isn't that a further opportunity to check the work of the optician to see that the optician has followed his instruction?

A. Yes, that is right.

Q. And that the patient is properly fitted with glasses?

A. Right.

Q. Then I am sure, Doctor, that you further agree that the professional man involved, whether he be ophthalmologist or optometrist, is fully responsible to his patient to see that he gets good eye care, good eyeglasses?

A. He should give that as a part of his service, yes.

Q. And you see nothing wrong with that provision in this law, do you?

A. No, I don't object to that.

Q. Isn't that merely making it required that good professional care be given to the defective vision of the people of Oklahoma?

A. Yes.

Q. Or any other state?

A. Professional care, as you ask, yes.

[fol. 632] Q. And that is——

A. Whatever that is.

Q. And that you believe the people are entitled to have?

A. Oh, yes, if they ask for it.

Mr. Branton: These questions, I take it, are directed primarily to the prescription, is that it, to the prescription for eyeglasses?

Mr. Daugherty: Well, I am not limiting it to that necessarily.

Mr. Branton: Then I object unless the question is clarified so that we can tell what you mean.

Mr. Daugherty: Your objection may be noted.

Mr. Branton: Yes, sir.

Mr. Daugherty: And made at the time of trial.

Q. Doctor, you are a member of the American Medical Association, aren't you?

A. Yes.

Q. And also are you a practicing ophthalmologist?

A. No. I have retired from practice.

Q. Oh, I see. You have practiced ophthalmology as a practitioner, have you?

A. Yes.

Q. For how many years?

[fol. 633] A. Oh, from 1912 to 1950 inclusive. How many years is that?

Mr. Phillips: It is a lot of years.

Mr. Daugherty: Q. You believe in the principles of medical ethics of the American Medical Association?

A. Yes.

Q. Do you believe that professional men should advertise the sale of eyeglasses?

A. Professional ophthalmologists should not.

Q. How about professional optometrists?

A. It is customary for professional optometrists to advertise their work and glasses in some sections of the country, and others not.

Q. In some sections yes, and some sections no?

A. Some sections no. It is not a universal thing at all.

Q. As far as an ophthalmologist, though, and a professional man, they should not advertise the sale of eyeglasses?

A. According to the principles of ethics.

Q. Don't you believe in those principles?

A. For ophthalmologists?

Q. Yes, sir.

A. As applied to doctors?

[fol. 634] Q. Yes, sir.

A. Oh, yes.

Q. You have already testified that eyesight, I believe, is a very precious thing and should receive professional care?

A. I have not testified that eyesight is a precious thing.

Q. May I ask you then, Doctor, if eyesight is a precious thing?

A. I don't know what you mean by a precious thing. I can't answer that question. You know that.

Q. Well, is eyesight a priceless thing?

A. I can't answer that. I don't know.

Q. Do you think that defective vision should receive professional care from qualified practitioners?

A. A patient who has defective vision may or may not require professional services. For his own personal good it might be advisable for him to have examination and advice, but maybe he doesn't need care. They don't all need that.

Q. Do you think an optician ought to examine a person's eyes to see whether he needs glasses?

A. Opticians do not do that. It is not part of their business.

[fol. 635] Q. Do you think they should be permitted to?

A. No.

Q. Do you think anybody should be permitted to make eye examinations except ophthalmologists and optometrists?

A. Yes. Any general physician can make an examination of an eye.

Q. When I say ophthalmologist I bean physicians who customarily practice ophthalmology.

A. Well——

Q. Do you think the professional services in connection with eye examinations, furnishing of glasses pursuant to that, should be advertised by these professional people, to make eye examinations?

A. My personal opinion is it is poor taste, but I am sure it doesn't do the public any harm.

Q. Do I understand that you don't agree with the ethics then of the medical association when they say that advertising by members of that association is considered unethical?

A. It is considered unethical.

Q. Do you differ with the principles of medical ethics then when they say that this principle protects the public?

[fol. 636] A. I differ with that.

Q. In other words——

A. It depends on what they mean by protecting the public. And may I also qualify my statement by saying the principles of ethics as they are established are changeable and are re-written from time to time, because of misinterpretation or misapplication, and what is included in the principles of ethics as now established is generally acceptable. At the same time I reserve the right to differ with the statements that are now embodied in the principles of ethics.

I might state further that persons who are responsible for the writing of the principles of ethics have recently asked us as ophthalmologists, of the three national ophthalmological societies, to offer revised statements to be included in the principles of ethics.

Well, what I am trying to say, that the interpretation of the principles of ethics as they are published, comes down largely to a matter of personal opinion, and those matters are debatable, yet overall the principles of ethics are acceptable and we live up to them.

[fol. 637] Q. Let me ask you, Doctor, do you believe that ophthalmologists should advertise their examinations and sale of glasses to the public?

A. No, ophthalmologists should not advertise their services, except in a manner that is considered proper, such as having your type of work listed in the telephone directory or city directory, but we don't include that really as——

Q. Talking about a business card?

A. No, not a business card. I am talking about a telephone directory.

Q. Just a listing in the classified section?

A. Classified section.

Q. Just a listing under doctors, for example?

A. Well, in some telephone directories they list them also as oculists and optometrists, but that is considered——

Q. That is not what I had in mind. I mean newspaper advertising.

A. Display advertising, so-called bait advertising? I do not approve of it.

Q. You do not approve of it in the field of visual care?

A. Or any other activities of any medical person.

[fol. 638] Q. Yes?

A. It applies just as much to those who are not ophthalmologists.

Q. You think this regulation of codes of ethics that prohibits this advertising which you disapprove of is for the protection of the public and to help insure that the public seek out on their own the services of qualified practitioners?

A. I don't think it is on that basis, a protection to the public. I think it is a matter of professional courtesy between individual practitioners.

Q. You don't feel that it protects the public in the least against unscrupulous people?

A. Let's don't make it so extreme. don't make it in the least, but it is not necessary or even advisable to have a strict prohibition of that as far as the public is concerned. No person is damaged by that. It is a matter of professional courtesy largely among the practitioners themselves.

Q. What about a person who is led to believe by an ad that someone can do something, say an eye examination, when in fact he can't, and he goes to that person and re-[fol. 639] ceives glasses that are improperly fitted? Hasn't he received some damage or some detriment?

A. I think you would have a very difficult time in demonstrating that any person is definitely damaged by being supplied with glasses that are not perfect correction of his refractive error.

Q. Well, how about a loss of efficiency?

A. It depends upon so many factors that a general statement of that kind wouldn't apply.

Q. Is there a loss of efficiency through improperly fitted glasses?

A. It would be very difficult to evaluate it. It depends on factors that are so imponderable, that no actual damage occurs from a person's getting glasses that are slightly off. I can wear——

Q. Do you agree with the principle——

Mr. Branton: Excuse me. Let him finish.

Mr. Phillips: Let the witness finish the answer.

Mr. Daughtery: I am sorry. I didn't know the Doctor wasn't through.

The Witness: A. I was going to say my personal experience is I can wear glasses that vary considerably from my actual—correction of my actual refractive error, and it doesn't impede my efficiency to any degree that I can [fol. 640] appreciate.

Mr. Daugherty: Q. You are speaking about your own personal case?

A. Yes.

Q. Doctor, do you agree with the proposition that glasses not properly adapted may seriously aggravate the condition of the patient and bring about nervous disorders and general discomfort and loss of efficiency?

A. In very exceptional circumstances that might apply to a more or less degree.

Q. Yes?

A. But whether one can actually say that that is what brings about this nervousness or not is a matter of opinion and should not be attributed exactly to this change in glasses.

Q. Well, at least you will state that ophthalmologists should not advertise their services?

A. That is right. I am sure of that.

Q. And will you extend that to include the optometrists?

A. I will not go that far. I will say that physicians, who are qualified medical men, should not advertise their services in any way. That to my mind does not necessarily [fol. 641] apply to optometrists. They are not physicians.

Q. Do you consider optometrists, or the practice of optometry as a profession?

A. Yes.

Q. Do you feel that professional men should not advertise their services?

A. Professional optometrists may advertise if they want to. In some places they do.

Q. I am asking you for your opinion, Doctor, not what is done.

A. Well then I will have to qualify my opinion. You included ophthalmologists and optometrists both as professional men, and I have excluded the ophthalmologists, and now you ask me to include the optometrists in that same exclusion, and I didn't do it.

Q. I am just asking you if professional men, and let's include lawyers with it——

A. I can't agree to that inclusion, sir. That is to my mind a leading question, and it isn't right and isn't fair, and I object to it.

Q. Very well, I will certainly withdraw the question, then, Doctor.

[fol. 642] You think this is a good law when it makes it unlawful for any optometrists or physicians to receive a rebate or kick-back from an optical company?

A. I think that is a good provision of the law.

Q. You think that is for the protection of public health and welfare?

A. No, not on that basis.

Q. On what basis then do you think that is a good provision?

A. A matter of decency in the pay, or whatever you call it, for the services.

Q. Do you think that eye examinations performed by an ophthalmologist should be done on a professional basis?

Mr. Phillips: Mr. Daugherty, you have asked that question about five times now.

The Witness: A. It can't be done on any other basis, if you include ophthalmologists as professional men.

Mr. Daugherty: Q. Do you favor a provision of the law that provides that ophthalmologists shall not make eye examinations as an employee of a lay body or a lay person?

[fol. 643] A. I don't agree with that provision strictly.

Q. And how do you reconcile that answer with the fact that you think that ophthalmologists should practice their profession professionally?

A. I make this exception, that in industrial medicine an ophthalmologist may be employed, the same as a man in industrial medicine, and part of his duties would necessarily be the examination of eyes.

It is done in industry by ophthalmologists, by optometrists, by nurses, and by trained lay people, and that facility and privilege should not be denied the people of Oklahoma, and I believe that such a provision as this you mentioned would deny them that privilege.

Q. Well now, Doctor, that is a matter of interpretation, and I won't attempt to argue with you about it, but may I give you this type of an example: Do you feel that an ophthalmologist should hire himself out to an optician and make eye examinations for that optician?

A. I think that would be very poor taste.

Q. Do you think that a law that prohibits that is a proper and good law?

[fol. 644] A. It has some merit, but it can also prohibit a perfectly desirable service. It would depend, I should say, on the ability of the ophthalmologist to perform the services and examine the eyes.

Q. Do you see any possibility that the commercial angle of the employer-employee arrangement might encroach upon the professional attitude of the practitioner to patient, to the detriment of the patient? Is that a possibility?

A. That is a possibility, and I think it is well taken. On the whole I should say I wouldn't approve of an employment of an ophthalmologist by an optician in a place of business such as is usually occupied by an optician. I think there should be some leeway for special exceptions.

As far as services to the public are concerned, a well qualified and competent ophthalmologist may function as such in the employ of a firm, corporation, hospital, or even a private optician.

Q. And again I may not——

A. And if he performs his services strictly in accordance with custom, it isn't a damaging service, and it doesn't lead to damage to the public, but it does upset some of our custo-[fol. 645] mary traditions of the type of services to the public that are to be performed by persons who are specially trained, and in ordinary work perform such services.

Mr. Daugherty: That is all.

The Witness: I mean I just don't want to limit it too much.

Mr. Daugherty: That is all. Thank you, Doctor.

Mr. Phillips: Doctor, let me ask you just a few questions.

Redirect examination.

By Mr. Phillips:

Q. I think it would be helpful if you would define an ophthalmologist and an oculist. Can you do so?

A. Yes. An ophthalmologist and an oculist is a doctor who specializes or limits his practice to the treatment of diseases and disorders of the eye. There is no distinction to be made between oculists and ophthalmologists. They mean exactly the same thing.

Q. Is any doctor who is specializing in the care of the eye entitled to use the word ophthalmologist?

A. Any——

[fol. 646] Q. Any medical doctor who is specializing in the care of the eye entitled to use the word ophthalmologist?

A. Yes.

Q. All right.

A. Do you want further qualification?

Q. Are there any further qualifications?

A. Any physician or medical doctor can have himself regarded as, and in a directory listed as an ophthalmologist, whether he has had any special training in that subject beyond his ordinary medical school or not.

Q. Is it customary, however, is it or is it not customary for the medical doctors who use the term ophthalmologist to have passed the examinations of the Board of Ophthalmology?

A. No, that isn't so.

Q. That doesn't follow?

A. No. Any person whose practice is generally admitted by himself to being fifty or more per cent of his total practice may list himself as an ophthalmologist and be so listed in the files of the American Medical Association and in their directory as such. It is purely a voluntary listing on his [fol. 647] own, and there are no specific requirements for it.

Q. Doctor, you mentioned that it was part of the customary field of opticians to duplicate lenses, is that correct, sir?

A. Yes, it is.

Q. You also testified that an optician properly trained and with proper equipment could take a fragment of a lens

which was off and duplicate that lens, is that correct, sir?

A. That is correct.

Q. If the fragment of lens becomes too small, you testified that a well trained optician would return the patient to the ophthalmologist or optometrist?

A. No. The optician—you speak of him as well trained or honest—would not perform the services of trying to supply another lens when he was unable properly to duplicate it, but that does not mean he would send them back to an ophthalmologist.

Q. I see. In your opinion, sir, in the event that the fragment were too small for him to properly detect the power of the lens and its refraction, and in lieu thereof himself substituted a lens of some other power, or whatever his guess of the power, would that in your opinion constitute duplicating?

[fol. 648] A. No, that would not be duplicating.

Q. Would that in your opinion constitute prescription for a new lens?

A. Not at all. It would constitute a disservice on the part of the optician, and something that he shouldn't do.

Q. If an ophthalmologist were asked by one of his patients to cause a lens to be duplicated, would he ordinarily agree to do so?

A. Will you repeat that? I didn't get that.

(Question read by the reporter.)

The Witness:

A. Well, that is a personal reaction that has no general application. It could be answered either way.

Mr. Phillips:

Q. There is no custom among ophthalmologists to your knowledge as to whether the ophthalmologist would undertake to cause the duplication or would refer the patient to an optician, for example?

A. Well, an ophthalmologist would not duplicate the lens himself, because ophthalmologists are not or should not be themselves dispensing opticians.

Q. I see.

A. There may be exceptions to that also.

[fol. 649] Q. If I understand you, do I understand you correctly that ordinarily the ophthalmologist would not undertake the task of duplication himself, but would either refer the patient or refer the lens to the optician for duplication?

A. Oh, yes, the ophthalmologist generally speaking is not equipped to furnish lenses and properly mount them in the frame. The mechanical part of it must be done in the place where they are fully equipped to do the work right, and by persons who have the skill and the knowledge to do it right.

Q. Is the duplication of the lenses in your opinion a mechanical process?

A. As far as the manufacture and production and finishing of the mounting of the lens, it is a mechanical process, but it requires a special knowledge on the part of the optician to take a blank glass of the right size and quality and put it through the grinding processes to make a product that is specified on the prescription.

That is not mechanical, but requires special training and skill, and the opticians have that degree of skill, some good and some not so good. That is a personal equation.

[fol. 650] Q. So would you say that the skills required in performing the various services that in your testimony you have ascribed to opticians are skills which you would characterize as that of a skilled artisan, a skilled craftsman or some other degree of skill?

A. More than that. It isn't purely a mechanical skill. It requires intelligence and understanding of the application of scientific laws and directives to adequately perform that service, and for that reason we have established schools so that opticians may have more and better training in that particular line of work, that is, we can make better opticians of them.

Q. In your opinion it is a separate set of skills of its own?

A. The ophthalmologist does not have that skill, and he must depend upon the optician to complete his services by filling a prescription, only a part of which he can specify, but cannot fulfill the services himself, therefore he must have an optician who is acquainted with the needs, who understands the service in its relationship to the service of the ophthalmologist.

[fol. 651] It is completing a service to a patient which the ophthalmologist himself cannot do, and which the optician himself cannot do, and only the two together can complete that service.

That is why, if one is called a professional, a little bit of that same regard and attitude falls over onto the optician, so that while his skills are a little bit different, if you will consider the amount of intelligence and training that is necessary to perform this work to the best advantage, then he must be considered a professional man.

Now that depends of course on how broad you will let your regard of the word profession mean. Is it a skilled service or a skilled profession? It is not to be defined by law. It is only a matter of understanding and through custom and connotation that eventually establishes what is profession and what is not.

Q. Would, in your opinion, it be accurate to say that he is a skilled professional man in substantially the same sense that a pharmacist is a skilled professional man?

A. The better trained and educated opticians are in a [fol. 652] sense as much professional as a pharmacist.

Mr. Phillips: That is all, sir.

Do you have any further questions?

Recross-examination.

By Mr. Daugherty:

Q. You mean that an optician is a professional man?

A. My statements I think bear out what I meant by a professional man. I just stated it to you.

Q. Is the practice of opticianry a profession?

A. In my opinion the practice of opticianry by men who are highly qualified may be considered as professional men, and opticianry on that basis I think should be considered as a profession.

Q. Opticianry, then, in your opinion is a profession?

A. I qualified my statement, and I will go as far as I qualified it, but I am not going to make it any more definite than that.

Q. Do you think that professional men should be licensed by the state in which they practice?

A. Not necessarily——

Mr. Daugherty: That is all.

The Witness:

A. —all professional m. n.

[fol. 653] Mr. Daugherty: That is all.

Mr. Phillips: Thank you very much, Doctor.

Now, you have the right, sir, to read this deposition and sign it before it is presented to the court, or you may waive the reading.

The Witness: Well, I would like to read it.

Mr. Phillips: Would it be agreeable to you, Fred, that we ask the clerk to send the original copy to the doctor?

Mr. Daugherty: No, I think the doctor had better, in this case I think he ought to consider some of his answers, I believe, and ought to read it.

Mr. Branton: Well, he meant to read it.

Mr. Phillips: On the same theory as before, and then he should send it directly to the court.

Mr. Daugherty: Yes.

Dr. William L. Benedict, Signature of Witness.

[fols. 654-657] Certificate of Notary Public to Deposition—(omitted in printing).

[fol. 658] In the United States District Court

[Title omitted]

Deposition—October 14, 1953

[fol. 659] Dr. Alson Emmons Braley, called as a witness on behalf of the plaintiffs, having been first duly sworn on oath, deposeth and saith as follows:

Direct examination.

By Mr. Phillips:

Q. Will you state your name, please?

A. Alson Emmons Braley.

Q. Will you state your profession or occupation?

A. I am a physician practicing ophthalmology at the State University of Iowa.

Q. Will you state whether you are a member of any professional organizations or a member of any committees of such organizations, or hold any offices in such organizations?

A. Yes, I am the chairman of the Department of Ophthalmology at the University of Iowa. I am a member of most all of the active ophthalmological societies, the American Ophthalmological Society, the Academy of Ophthalmology and Otolaryngology, the American Board of Ophthalmology.

Q. Are you a member of any committees of the Academy of Ophthalmology?

[fol. 660] A. Yes, I am the representative of the Academy of Ophthalmology to the American Board of Ophthalmology. I am on the Inter-professional Committee for Eye Care and National Inter-professional Committee for Eye Care.

Q. Will you describe the activities and general occupations and functions of the National Inter-professional Committee for Eye Care?

A. The National Inter-professional Committee for Eye Care is a committee that has to do with trying to form better relations between ophthalmologists, optometrists and opticians, both the wholesale and the retail opticians, so that the public will get the best possible eye care that it is possible to give.

Q. As chairman of the Department of Ophthalmology of the University of Iowa do you instruct in the department, sir?

A. Oh yes. I have about ten of what we call residents. They are young men who have graduated from medical school, have taken an internship, and are now being instructed in ophthalmology in our department.

Q. Will you state the colleges or universities from which [fol. 661] you are graduated, and the degrees that you hold?

A. I hold only an M.D. degree from the University of Iowa. However I have done research at Iowa and Columbia and at New York University, that is Columbia University in New York, and also the New York University.

Q. Are you familiar with the general field and practices

employed by ophthalmologists in prescribing eye glasses for patients?

A. I am.

Q. State the practice of ophthalmologists to issue prescriptions for glasses for the patients.

A. It is the practice of ophthalmologists to issue prescriptions or write prescriptions for eye glasses, the same as we write a prescription for a drug. The prescription is taken to the drug store and the prescription is filled. Our association with the glasses is that we do write a prescription, which then the patient takes to the optician, and the optician fills that prescription.

Q. What does the prescription which you issue to your patient contain?

A. The prescription only contains a description of the type of lens which is to be manufactured, the amount of [fol. 662] correction that is to be placed in the glass.

Q. The prescription does not contain a description of the frames?

A. No. There is no real description of the frames. Occasionally for certain types of glasses we suggest certain types of frames, the same as we suggest certain types of glasses to fill a particular prescription. We know they will function better than some other type of glass or frame.

Q. What would be those occasions, sir, in which you would suggest?

A. Well for instance after a cataract operation there are certain different kinds of glasses that fill a prescription better, and we recommend those.

Now that doesn't necessarily mean that the patient will order those or want to buy that particular kind of glass.

Q. Would the occasion on which you would recommend the frame be frequent or rare?

A. Oh it is rare, I would say. We usually leave that entirely to the discretion of the patient as to the type of frame that she likes to get or he likes to get.

[fol. 663] Q. What in your opinion, sir, are the primary tests of the selection of an appropriate frame?

A. Of course the size of the width between the nose, the size of the frame as it goes out to the side of the face, and that is a function that we do not ordinarily do. The only

function that we have really is to recommend the kind of glass that they are to get.

Q. You testified, sir, that your practice is to issue prescriptions which are given to opticians for filling?

A. That is right, sir.

Q. Are you familiar with the practices and procedures employed by opticians generally in filling such prescriptions?

A. Yes. Of course we must have contact with opticians who will fill our prescriptions well, and of course we are constantly on the alert for good qualified opticians.

Q. Will you describe the general functions performed by opticians in filling your prescriptions?

A. Well of course that I more or less leave to them. When I find a good qualified optician, as we have at the University of Iowa of course, now these men take a blank glass, center [fol. 664] it, grind on the powers that we have given in our prescription, edge the lens, fit it into a frame that has been usually the patient's choice, with the help of the optician, so that the frame will fit the face, and so forth, and then the glasses are finally made up in that frame and given and fitted to the patient.

Q. The optician who is handling your prescription fits the frame to the face?

A. Correct.

Q. Do you check his fitting then?

A. Yes, we always check the patient, mainly to be sure that the patient's frame fits the face all right, to be sure that the glasses are made properly and that, for instance in the case of a bifocal, that the bifocal segment is at the proper level.

Now if we have a competent optician, as we have at Iowa City, we check, and it is more or less of a supervision check to see that it is all right, to be sure that it is right.

Q. Will you state whether or not the purpose of your check is to determine whether the optician is qualified, or to determine whether there has been a human error committed [fol. 665] in the fulfilling of the prescription?

A. Well ordinarily we try to ask our patients, not always ask them, but we hope that our patients will go to a qualified optician, and because we do not necessarily say "You must

go to this optician to have your glasses made," we like to check to be sure that the glasses are all right, are satisfactory.

In the case of a good optician whom we have been associated with for many years, as we have at Iowa City, we only check to be sure that the patient is satisfied with the glasses.

Q. Very good, sir.

Mr. Harkey: Counsel, it is now fifteen after two; past that. Do you propose to continue so that we will be permitted to have an opportunity to cross examine?

Mr. Phillips: No, sir, we propose to continue, and to afford you the opportunity to cross examine at a later time.

Mr. Harkey: Today?

Mr. Branton: No, sir.

Mr. Harkey: You will not afford me an opportunity to cross examine today?

Mr. Phillips: Not unless the witness can make himself [fol. 666] available at any time later in the day.

Mr. Harkey: I would like at this time to interpose an objection to the introduction of this testimony in this trial unless opportunity is afforded the defendants to cross examine this witness on this day, inasmuch as counsel remained in this room ready to take the testimony of the witnesses from 9:30 A.M. on this date until 1:00 P.M., returned at 2:00 P.M., at which time the examination of this witness commenced.

Mr. Phillips:

Q. Doctor, are you familiar generally with the practices and procedures employed by optometrists?

A. Because of my association with the Inter-professional Committee on Eye Care in Iowa I have become acquainted with many of their practices and their profession.

Q. Do you know whether or not it is the general practice of optometrists to dispense their own eye glasses?

A. That is generally true, in our state at least, that the optometrists usually dispense their own eye glasses. Not all of them though. There are a few optometrists in our state who send their prescriptions to opticians for dispensing.

[fol. 667] Q. Do you know, Doctor, whether the profession or craft known as opticianry is of recent origin or of an ancient origin?

A. It is of ancient origin. The opticians have been making glasses for many, many years, and of course the Zeiss Company in Germany is well known, and of course the Bausch & Lomb Company in the United States, for the manufacture of glasses, is well, is very well known, and glasses have been manufactured—as a matter of fact Benjamin Franklin made the first paste-on bifocals, as you know, from trying to get something that was a little more convenient for him to read; so that glasses have been made for many, many years.

Q. Do you know, sir, whether in the fields of ophthalmology and optometry opticianry is generally recognized as a separate field?

A. Opticianry is generally recognized as a separate field, and particularly in an area where ophthalmologists must by necessity have someone to fill their prescriptions.

Q. In your opinion then is it necessary for an optician to have the skills and educational background which are re-[fol. 668] quired by law to be possessed by an optometrist in order that he may properly perform his function?

A. Not the same skills, I would say. The skills of the optometrist are primarily those of measuring for glasses, similar to what we do, whereas the skills of an optician are primarily those of knowing glass, of knowing some of the mechanics of fixing glass. They are excellent mechanics. They must know physics, and all of the properties of what happens with glass, and when you do work with it, and the other things too, for that matter, so that their skills are usually considered more of a mechanical nature than are the optometrists' or the ophthalomogists'.

Q. In your opinion, sir, is an ophthalmologist trained to perform the services which customarily are performed by opticians?

A. Well the field of ophthalmology is so enormous, that my program at Iowa City is a four-year program, during which time it is next to impossible to teach him to make his own glasses.

It would be physically impossible for an ophthalmologist

to also, besides his other duties with medical pathology and [fol. 669] everything, to make his own glasses.

Q. In your opinion is a well trained optician more competent to perform the functions of an optician in fitting frames to the face, than the ordinary ophthalmologist?

A. Yes, they are, because they are, to begin with, usually interested in mechanical things. They are very clever with plastics, and very clever in their handling of glass; the well trained opticians are; and certainly they can do things with glasses and frames that I cannot begin to do, and I don't have the training nor the interest to do.

Q. Doctor, what are the procedures employed in order to duplicate a lens?

A. The lens is ordinarily measured by a measuring device which is called a lensometer, and with this device they can measure the prescription, ordinary prescription for a lens, and with that measurement they can re-duplicate a lens providing they have enough of the glass left to re-duplicate from.

Q. Is the technique of operating a lensometer a technique which requires the trained skill of an optician and ophthalmologist?

[fol. 670] A. Well the opticians are very clever at it. As a matter of fact they do very well at operating it. As a matter of fact the opticians actually first made the first lensometers that were made.

Q. Thank you, sir. In the course of your experience with the Inter-professional Committee are you familiar with any efforts by opticianry to improve the qualifications of its personnel?

A. Oh my, yes.

Q. Would you state some of those efforts?

A. In Iowa our Inter-professional Committee Local State Committee, has started a society for opticians, and we are in the process now in Iowa, through the opticians, of attempting to have the opticians registered and take an examination in the state so that they will come up to certain qualifications that we think are rather important for their performing their functions or their duties.

Q. Are you familiar with the Board of Opticianry?

A. Yes, I am familiar with the Board of Opticianry.

Q. Can you state the function of that board?

A. The function of the Board of Opticianry is an effort on a national level of all opticians to elevate the training or to improve the training of opticians so that all opticians [fol. 671] will be qualified as qualified opticians, qualified by the Board of Opticianry.

Q. Will that board serve a function similar to the function of the Council on Ophthalmology, the Board of Ophthalmology?

A. Yes. Of course it at the present time fills a function similar to the Board of Ophthalmology. They are not allowed a license by any manner of means, by taking the board. It is a personal thing, in knowing that you have filled the qualifications necessary to take the American Board of Ophthalmology, as far as ophthalmologists are concerned, and so far as opticians are concerned, to pass the tests of the American Board of Opticianry.

Mr. Phillips: It is now 2:30.

The Witness: I could stay a little while.

Mr. Phillips: All right, sir.

Cross-examination.

By Mr. Harkey:

Q. Dr. Bradley, do I understand from you that an optician is a person who makes glasses?

A. That is correct.

[fol. 672] Q. In your work as a practicing physician when you write a prescription do you consider that your physician-patient relationship is ended then, or do you insist that the patient return so that you can check the glasses to see that they properly fit?

A. If we have a qualified optician such as we have at the University of Iowa, it is not always necessary to have the patient return. However it is nice to have them return to be sure that the glasses fit the patient well, and be sure that they are all right.

Q. In other words you don't pass that responsibility on; you feel that you are still responsible for the visual care of your patient?

A. Yes, but they still perform a very important function.

Q. In other words the physician is still responsible?

A. The physician is not responsible for the—really, for the manner in which the glasses are manufactured or made. That is one reason why we check them. If the glasses are not properly made we send them back and they are remade until they are right.

Q. In other words if a pair of glasses are improperly fitted and improperly made, you consider that it would be [fol. 673] your responsibility to inform the patient of the fact and to insist that the glasses be made properly to fit your prescription, is that correct, sir?

A. That is correct.

Q. In the event that you did not put down the size of a lens, and the patient were to talk to the optician and they were to decide to have certain large sun goggle lenses made to that prescription, would the optician go ahead then and convert the prescription to the large type of lens, or would he refer the patient back to you for that conversion?

A. Under ordinary circumstances, where I am, the optician usually calls up on the telephone and says, "Will it be all right if we make up a large type of sun glass for this patient?"

Q. Doctor, in your course there you do give instructions on eye refractions, don't you?

A. Oh yes.

Q. What percentage of the time that a resident spends in his residency is spent on the instructions in refractions of eyes?

A. You mean in my four-year residency?

Q. Yes, in the four-year residency, instruction and [fol. 674] training.

A. Instruction and training. I would say he does it full time for a year, and there is never a patient comes in but what we don't refract the patient, and therefore the refraction is part of almost every examination.

Q. Now, Doctor, what percentage of your patients, outside of athletes, do you normally prescribe contact lenses for?

A. Do I normally prescribe contact lenses for?

Q. Excluding athletes.

A. Excluding athletes. Oh, one per cent or less I would say.

Q. Why do you not prescribe more contact lenses?

A. Well because contact lenses under ordinary circumstances have not in my opinion proved entirely satisfactory for constant wear.

Q. Do you think that a person should, without the advice of an ophthalmologist, wear contact lenses for cosmetic purposes?

A. You understand I am on the Inter-professional Committee for Eye Care, and there are a fair number of optometrists who make contact lenses. I am trying with all my effort to bring about the best possible cooperation between [fol. 675] all three groups involved, and therefore I would prefer not to make a direct statement as to who should fit contact lenses and who should not.

Q. That wasn't the question, Doctor.

A. Well you asked me——

Q. No, that wasn't it. Read the question.

(Question read by the reporter as follows:

Q. "Do you think that a person should, without the advice of an ophthalmologist, wear contact lenses for cosmetic purposes?")

Mr. Harkey: Q. Well we will change that, Doctor. Without the advice of an ophthalmologist or optometrist should a person wear contact lenses for cosmetic purposes?

A. I still give you practically the same answer so far as I am concerned, because I realize that there are many people who would like to try contact lenses, and I know from past years of experience of fitting contact lenses that the majority of the lenses will spend most of their life in the top dresser drawer, particularly if they are for cosmetic purposes.

Q. Doctor, do you in your business as a practicing phy- [fol. 676] sician do any advertising either in the newspapers or over the radio, soliciting patients to come to you?

A. Never.

Q. Do you know of any ophthalmologsts that do such?

A. No, I don't know of any.

Q. Do you know of any good opticians that advertise in such a manner?

A. There are some opticians, some, that I would consider as fairly good opticians, who occasionally put in the newspaper an ad on better vision, and on occasion will actually put in an advertisement for possibly a new frame or a new type of frame.

Q. Doctor, do you think that is good from the standpoint of visual care of our public to have any person advertise glasses in the newspaper or advertise visual care or professional examinations?

A. Well now you are hitting on a very, I think a very touchy point. In the first place, people must be educated by some manner or means.

Q. Well this——

A. I, for instance I put on, not long ago, a television show for the State Medical Society. Now I know that some of my friends say, "Well that is an advertising media."

[fol. 677] Q. Well, Doctor, wasn't the show designed to get people into a certain place of business so that they would buy glasses?

A. No, it was not. It was only for education.

Q. It was only for education?

A. That is right.

Q. That would be what we would call ethical educational publicity by a legally considered health group, wouldn't it?

A. That is right.

Q. And that kind of educational publicity is a proper educational medium that your ethics of the American Medical Association covers?

A. Yes.

Q. Now do you think that any person should have steerers or cappers or solicitors soliciting patients for them to have an examination given to them?

A. Oh no.

Q. Do you think that people should be enticed into a place of business to buy glasses because of window displays of frames and so forth?

A. Well, looking at it from the patient's viewpoint, and particularly my wife's viewpoint, I can say that she is on the constant lookout for a new type frame for herself that

[fol.678] will go with another dress, or this and that. You know, I mean it is one of those things that——

Q. Doctor, I would like to ask you, does your wife have any cylindrical correction in her prescription?

A. Well she has, yes.

Q. If for instance she were to wish to have her—say she had on one of these sharp diagonal lenses like the ladies do wear now, that gives them a slightly oriental look, it is almost impossible after a lens has been broken, from such a glass to determine what the accurate axis of the cylindrical correction was, isn't it?

A. (No answer.)

Q. Now would you want your wife to——

Mr. Phillips: I object to that question.

Mr. Harkey: Q. ——to go into——

Mr. Phillips: The counsel is now testifying. Please ask a question.

Mr. Harkey: Q. Would you like for your wife to go into an optician that you didn't know and have an attempt made to duplicate a broken lens of such type for her?

[fol. 679] A. I can see that you know a great deal about this business, probably a little more than I do actually, and for that reason I believe that a good optician might be able to tell what that lens was.

Of course it isn't always possible from a broken piece of glass, unless you have, as I said before, unless you have a piece big enough, you can't always find out what the glass is, and a good optician would admit immediately that he couldn't tell.

Q. Dr. Braley, after all is said and done the best way for you to take care of your wife's vision, after she has found her frame, is to come back and have you sit her down before a phoropter and check her with the glasses on, isn't it?

A. Well I don't know. I suppose.

Q. Do you believe, Doctor, that an unqualified person should receive compensation for visually correcting the eyes of another one?

A. I am sorry, I don't know what you mean by that?

Q. Well do you believe that a person who is not an op-

tometrist or ophthalmologist should receive pay for prescribing glasses for a patient?

A. For prescribing glasses?

Q. For prescribing glasses for a patient.

[fol. 680] A. Well what are you going to do about the glasses that are sold in the dime store?

Q. Well let's except that right now, and then I will come to that in just a moment.

A. Oh.

Q. For prescribing. It is my understanding glasses in the dime store are not prescribed.

A. I see.

Q. For writing a prescription.

A. For writing a prescription? Well as far as I know the only ones who actually write the prescription—the opticians have nothing to do with prescriptions, let's say. The only thing they do is actually make the lenses. They don't prescribe the glasses.

Q. Now do you think that the optician should steer people to the office of specific oculists or specific optometrists for examination, or do you think that is soliciting like any other type of health soliciting?

A. No. I am sure that in any practice, no matter where you go, there is a certain amount of steering.

For instance my wife goes in to have her funny shaped glasses replaced because one lens is broken, and they are unable to do so. The optician says, "Well I cannot re-[fol. 681] place it. You will have to go and see your ophthalmologist or your optometrist in order to have it replaced." I don't believe that is necessarily steering.

Q. No, but if that optician were to say you should go and see Dr. Brown or Dr. Jones or Dr. Conte and get a prescription, would you think that that would be proper?

A. That is not proper, no.

Ordinarily, however, a new individual in a town, coming to a town, the way we do it in Johnson County Medical Society, is to refer them to the Johnson County Medical Society, and they there have a list of people that they refer to.

Q. Now, Doctor, when a grandma goes into the dime store to buy a pair of simple magnifying type reading glasses,

do you think that she is expecting a professional service, or she is just buying a pair of reading glasses?

A. Well of course she is not expecting a professional service. She is only getting a pair of reading glasses.

I will have to be going.

Q. One further question. Doctor, do you think that a physician should have and maintain an office in a drug store [fol. 682] where the clerks and the druggist refer patients to him? Except a small, we will say a very small town where it is natural.

A. Oh, my father was a druggist. My father was a druggist, and I lived in a small town, and the people used to come in there, and we tried our best to take care of the public health of that community and we referred patients to the doctor who was in the same building with us.

Q. Was he down right in the drug store?

A. No, sir.

Q. Or in the same building?

A. He was upstairs. He was in the same building, it is true, and we referred them to him.

We took care of what we could, particularly at night, because the poor guy was overworked to begin with; and I lived in a small town from the time I was a boy until—well, still live in a small town for that matter.

Q. Do any of the good opticians that you have faith in have shops in jewelry stores?

A. No.

Q. Do you think that would be very proper for an optician to have his glasses and frames in the windows of a [fol. 683] jewelry store and operate as a part of a jewelry store?

A. Well of course that is what we are trying to do, we are trying to improve the profession of opticians. The bulk of them are fine men.

Q. Yes. And do you find that among these eye glass mechanics that some of them—that you just will run into a sour apple once in a while?

A. You run into sour apples no matter where you go, in every profession, no matter what profession you run into. You run into an occasional sour physician too.

Q. Do you think in the case of a sour physician or sour

optician that the law should crack down and force them to take good care of public health?

A. The public health of course is the most important thing.

Mr. Phillips: I hate to interrupt you, but it is now quarter of three.

Mr. Harkey: You want to leave?

The Witness: Yes.

Mr. Phillips: Mr. Daugherty, do you desire to cross examine?

Mr. Daugherty: Yes, I have some questions I would [fol. 684] like to ask the doctor.

Mr. Phillips: Doctor, when would it be possible for you to resume?

The Witness: Well I could come up after I finish the class.

Mr. Phillips: What time would that be, sir?

The Witness: Well let's see, have you got one of the books?

Mr. Phillips: Yes, sir.

The Witness: It will be a little after four.

Mr. Phillips: We will wait for you.

Cross examination.

By Mr. Daugherty:

Q. Now, Dr. Braley, you of course are an ophthalmologist?

A. That is correct.

Q. Are you a practicing ophthalmologist?

A. I do practice.

Q. You also instruct at the University of Iowa?

A. That is correct.

Q. You are a member of the American Medical Association?

A. I am.

Q. Are you familiar with the principles of medical ethics [fol. 685] of the American Medical Association?

A. I am.

Q. Do you believe in those principles?

A. I do.

Q. Do you follow them?

A. I do.

Q. In your opinion is there anyone other than an ophthalmologist or an optometrist that is qualified to make an eye examination and write a prescription for the grinding of lenses for the correction of defective vision?

A. That is correct.

Q. Those are the only qualified people?

A. Yes, sir, to date those are the only qualified people, that is right, so far as I am concerned. There are no others.

Q. In your opinion as an expert in the field of vision, those are the only two qualified people to make an eye examination?

A. That is right.

Q. Do you feel that in the interest of public health and in the interest of good visual care that unqualified people should be prohibited from making eye examinations?

[fol. 686] A. From making eye examinations, that is correct.

Q. Do you then agree that only well trained and qualified optometrists and ophthalmologists should make eye examinations and prescribe for glasses?

A. That is correct.

Q. Do you feel that an optician should dispense glasses only on the written prescription of a well trained and qualified ophthalmologist or optometrist and no one else?

Mr. Branton: Excuse me. May we go back? I wanted to wait until you asked that question. May we go back to the question before? I notice you used the word glasses. By glasses were you referring to lenses or were you referring to the entire glasses?

Mr. Daugherty: Lenses, I think.

Mr. Branton: Lenses. All right.

Mr. Phillips: I believe the doctor answered it.

The Witness: I answered it as lenses.

Mr. Branton: Excuse me.

Mr. Daugherty: Did you get the last question, Doctor? Will you read it?

(Question read by the reporter.)

Mr. Branton: Now again you mean lenses?

[fol. 687] The Witness: Lenses.

Mr. Daugherty: Yes, sir.

Q. Do you feel that when a prescription is made for lenses by either an ophthalmologist or an optometrist, that that person should remain responsible for the full effect of any appliances which may be furnished pursuant to his prescription?

A. He is responsible for the lenses and the manner in which they are placed in front of the eyes.

I don't see how he can be responsible for the type of frame that the patient buys on his own.

Q. Well maybe you did not quite understand my question. Is he responsible for the full effect of any appliances which may be furnished him by anyone else?

A. He is responsible to be sure that it is correctly made.

Q. Do you feel that when a patient comes to you with defective vision that there is established between you and that patient a professional relationship?

A. Very definitely.

Q. Is it also a confidential relationship?

A. Very confidential.

[fol. 688] Q. Do you feel that anyone else should share with you that professional confidential relationship with your patient with reference to his visual care?

A. I believe that I can see some implications in the question that I am unable to say for sure.

For example I do not dispense my own drugs, and by ordering a specific drug for a patient from a drug store, that may in itself divulge certain secrets about the patient, which I cannot be responsible for, and I write a prescription for a drug which the patient takes to the drug store, where the druggist fills that prescription, and he in turn may have some idea about what the drug is administered for.

Now so far as glasses——

Q. Let's stay on eye glasses, Doctor. Your prescription, as far as I am concerned, where you attempt to correct the vision of one's eyes.

A. Yes.

Q. Don't you feel that you are responsible when you

undertake on a professional basis to treat corrective vision, don't you feel you are responsible for it?

A. I am fully responsible for it. I feel the responsibility, [fol. 689] but in turn I cannot manufacture the glass, nor can I—do I have the time to make the glasses for the patient, and therefore I have to turn over a certain amount of that responsibility to someone else and see to it that those glasses are properly made, you see. No more than I could set up a plant like the Bausch & Lomb Company has. I couldn't possibly do that.

Q. But you say that you see to it that the glasses are properly made?

A. Yes.

Q. And in other words you feel professionally responsible to see that your patient gets the proper visual care at your hands?

A. That is right.

Q. Do you think that human eyesight is a very precious thing?

A. Very valuable, or I would not be in ophthalmology.

Q. Do you think it should be taken care of professionally or commercially?

A. It should be taken care of professionally.

Q. Do you think that a person who has defective vision and needs lenses should start out in the office of a professional man for that need?

[fol. 690] A. That is a normal process as far as I am concerned.

Q. You think that is where it should start?

A. That is where it ordinarily starts.

Q. I believe you testified that you believe that the examination of the eyes, and visual care, should be done professionally and not commercially?

A. That is correct. That is what we are striving to get.

Q. Do you advertise your professional services?

A. Do I?

Q. Yes.

A. Never.

Q. Do you think that——

Mr. Harkey: Counsel, can we put, with indignation "Never"?

Mr. Daugherty:

Q. Do you think that advertising should be permitted with reference to the matter of visual care?

A. Not advertising with reference to visual care. So far as I am concerned I don't think that there should be any.

Q. Do you know what bait advertising is?

Mr. Branton: I object to that question unless some indication is given as to the definition of visual care. What [fol. 691] does visual care mean? How do you intend it?

Mr. Daugherty: Are you through with the objection?

Mr. Branton: Yes, sir.

Mr. Daugherty:

Q. Now you may answer my question. Do you know what bait advertising is?

A. No, not for sure. I don't know what your interpretation of bait advertising is.

I know that we have discussed in the Inter-professional Committee on a number of occasions price advertising, in which they advertise a price, a low price for a pair of glasses. That may be interpreted as bait advertising, and of course that is one of the things that our Inter-professional Committee is trying to eliminate, is the price advertising.

Is that what your interpretation of bait advertising means?

Q That is one interpretation of it, yes, Doctor.

As an ophthalmologist then are you opposed to any form of advertising as the same pertains to visual care which would cause a member of the public to come into a non-professional establishment when in need of visual care?

[fol. 692] Mr. Branton: Excuse me. Again I object unless there is some definition of what the word visual care means.

Mr. Phillips: Why don't you state directly what you have in mind with respect to your advertising?

Mr. Harkey: He is using legal terms.

Mr. Phillips: Well that may be, but we are not speaking to a lawyer. As a lawyer I don't know what visual care means either, so——

Mr. Branton: That was for the record, Doctor.

Mr. Phillips: That was for the record, Doctor.

The Witness: Yes, I see.

Mr. Phillips: If you desire to have the question so it will be clear——

Mr. Daugherty: Will you read the question for him, please? See if the doctor understands it.

(Question read by the reporter as follows:

"Q. As an ophthalmologist then are you opposed to any form of advertising as the same pertains to visual care which would cause a member of the public to come into a non-professional establishment when in need of visual care?")

The Witness:

A. Well I am apposed to advertising for the most part. [fol. 693] I can see that some of the advertising of the American Optical Company that has been done in the Saturday Evening Post and other journals has been good advertising in that they are attempting to educate the public that they should have professional examinations for the care of their eyes, while I can see other types of advertising that would incriminate certain individuals to a certain extent.

For instance, I am opposed to the type of advertising that is done by some of the optical companies, as what you might term as price—or I would term as price advertising, and to much of the advertising of course that goes on in a number of our newspapers throughout the middle west, which I am opposed to, so that I would have to qualify it to say that if you can draw the attention of the public to professional examination, that that type of advertising might be all right, but certainly not the type of advertising which you have in mind. Perhaps I should say that.

Mr. Daugherty:

Q. You have already testified that you feel that if a person has defective vision and needs visual care, that they [fol. 694] should start in the office of the professional practitioner?

A. That is correct.

Q. Are you opposed to any type of advertising that will cause that person in need of eye care to go somewhere else in search of eye care?

A. Yes, I am opposed to that type of advertising, yes, except you understand now that the advertising that the American Optical Company and the Bausch & Lomb Company have put out in some of the larger journals I believe has helped to draw the attention of the public to the fact that they may need eye care.

Q. I am not——

A. And to seek professional advice.

Q. I am not familiar with that advertising, but that advertising does not attempt to cause the public to go into a non-professional place in search of eye care, does it?

A. Oh, absolutely not. I don't think so.

Q. Doctor, as an ophthalmologist do you also feel that ophthalmologists or optometrists should not receive rebates or kickbacks from opticians?

A. I have never received one in my life.

Q. Do you feel that a law which so prescribes is a good [fol. 695] law for the benefit of the public?

A. Yes, so far as I am concerned that is true.

Q. Do you feel, Doctor, as an ophthalmologist that it is good for the public health and the public welfare and good for visual care of the citizens of any state for it to be unlawful for an optometrist or an ophthalmologist to permit an optician to solicit business for them?

A. I don't see how an optician can solicit business for an individual. I can see where, if someone walked into an optician's shop and said, "I need an eye examination and I don't know where to go," the optician might have a list of names.

Q. Wouldn't that be a referral?

A. Well, no more than the referral would be that, to come back to the original thing, that the optician must say to the patient the eye examination must begin in a professional office.

Q. Well you know what I am talking about——

A. No, sir, I do not.

Q. —when I say that professional men do not solicit business?

A. That is right.

Q. Do you believe in that principle?

[fol. 696] A. I certainly do.

Q. Do you think that is good for the profession?

A. Good for the profession?

Q. Yes.

A. Yes, I think it is good for the profession.

Q. You think it is also in turn good for the public welfare?

A. Well I don't know about that for sure, but I believe that it is good for the public welfare provided the public can be educated, you see.

Q. Well we are getting back to the question as to whether or not you think that the care of defective vision should be done professionally.

A. Yes, I believe I have already stated that very definitely.

Q. All right.

A. That the care of defective vision should be done professionally.

Q. Then you know that professional men do solicit, don't you?

A. That is correct.

Q. Then do you think that it is good for the public welfare, for optometrists and ophthalmologists to be denied the opportunity or the right to permit opticians to solicit their [fol. 697] professional services for someone in need of eye care?

A. I don't quite understand the question, really, because it is a lot too involved. You understand now so far as——

Q. Let me ask it to you this way——

A. If you can put it simply, why it would be easier.

Q. You have agreed that care of defective vision should be done professionally.

A. Correct.

Q. As a professional man you agree that you should not solicit business?

A. Right.

Q. Do you then feel that in your opinion, since you think eye care should be treated professionally and that you should not solicit, that you should not solicit through the optician as well as anyone else?

A. No, you should not solicit through an optician.

Q. Or anyone else?

A. Or anyone else, that is correct.

Q. And do you think such a law is good for public welfare and good for the visual care of the people of a given community?

[fol. 698] A. Yes, I presume. I don't see how you can though, as I said earlier, how you can prevent the circumstances of an individual going into an office and have their optician say, "We cannot give you a pair of glasses; you have to go some place else and seek professional care first," and the individual will say, "Where shall I go?"

Now the only thing that the optician can do is to give you a list of names.

Q. Well that is not solicitation under the question I put to you.

A. I see. Well I believe that part is all right, because I have had patients referred. I practiced in New York for a good many years, and thank goodness, my name used to come up occasionally when I first got out of the Navy, and on some of these I got an occasional patient.

Q. Doctor, perhaps you don't quite understand the general trend of my questions. They pertain to whether or not you feel basically that visual care for defective eyesight should be handled commercially or should be handled professionally.

A. Well I have already answered the question that it should be handled professionally.

[fol. 699] Q. Well that is what I say, I think you don't understand the trend of the question.

Mr. Harvey: Counsel, I think that the doctor has been in such a professional vacuum that he does not understand the fighting in the street that you are referring to.

Mr. Phillips: I will add that I don't blame him.

The Witness: So far as I am concerned——

Mr. Phillips: Is there some way you can ask him more definitely what you are driving at?

The Witness: So far as I am concerned the majority of people that I deal with, all the people I deal with are professional people. The opticians that I have are professional opticians. They do not advertise. They never seek any-

thing except the prescriptions that come their way, and they do not solicit business, other than perhaps to display frames in the window, and that is all, and even there the situation is nothing compared to the display of most of the business establishments that we are well acquainted with. It is a very minor display comparatively.

Mr. Daugherty:

Q. Again, in the interest of seeing that defective vision is treated professionally, do you feel that ophthalmologists [fol. 700] or optometrists should hire themselves out to the lay person or lay group and make eye examinations for such lay person or lay group?

A. Never.

Q. Do you feel that that arrangement is bad for the public welfare with reference to visual care?

A. I feel that that arrangement is bad for the public welfare.

Q. Do you likewise feel that the reverse of that is for the good of the public welfare, in that lay persons are prohibited from obtaining or making eye examinations through the employment of an ophthalmologist or optometrist on a salary or commission basis?

A. I got lost in that one. Will you repeat it?

Mr. Phillips: I object to that question on the ground there is no issue involving that particular phase of this activity, involved in this lawsuit.

Mr. Daugherty: Will you read the question, Miss Molle?

(Question read by the reporter.)

Mr. Phillips: The question of the propriety of corporate practice through licensed practitioners is not involved in [fol. 701] this lawsuit, and therefore we object to that line of questioning as being irrelevant and immaterial.

Mr. Branton: And in order not to interrupt, may it be understood that our objections will go to his entire line of questioning dealing with the matter?

Mr. Daugherty: Of course this is under the Federal Rules. You can make any objection you wish at the time of trial.

Mr. Branton: Rather than interrupt you every minute here.

Mr. Daugherty:

Q. Now will you answer the question?

A. Do you mean by the question that an optical company hires an ophthalmologist or an optometrist to do certain functions for them, and to lawfully put them in the business of eye care? Is that the question?

Mr. Daugherty: I think I put my question properly. Will you read it again and we will see if you understand it? I didn't limit the question.

(Question read by the reporter as follows:)

"Q. Do you likewise feel that the reverse of that is for the good of the public welfare, in that lay persons are prohibited from obtaining or making eye examinations through [fol. 702] the employment of an ophthalmologist or optometrist on a salary or commission basis?")

The Witness:

A. Why I believe that is wrong for lay groups to employ an ophthalmologist or an optometrist to give eye care. There are a few exceptions, however, in certain areas, and that is, we will say, in the insurance group in New York. Now the insurance group in New York City hires certain people to help them do some of their eye examinations, which are done.

Mr. Daugherty:

Q. Well, Doctor, you are going far afield.

A. Well——

Q. We are interested——

A. You are going far afield too as far as I am concerned, you see.

Q. Well I am merely asking you if you feel that eye examinations by an optometrist or ophthalmologist should be made by such person while on a salary or a commission for some lay or commercial group, or whether or not the ophthalmologist or optometrist should make his eye examination as a professional service.

[fol. 703] A. The eye examination should be as a professional service.

Q. And this professional service should be free from any commercial control?

A. The professional service should be free from commercial control. I agree to that.

Mr. Harkey: May I ask him one question?

Mr. Daugherty: Go ahead. I think I am through.

Cross-examination.

By Mr. Harkey:

Q. Doctor, do you think that eye examinations should be conducted in a portion of a retail establishment, the main purpose of which is devoted to the commercial sale of merchandise?

Mr. Branton: Excuse me. Same objection, please.

The Witness:

A. I feel that the ophthalmologist should not be in direct association nor with any optical company. He should not have his office in the building—I mean it could be in the building, but not in the same office space as an optical company.

Mr. Harkey:

Q. And your same answer would go to an optometrist——

A. That is right.

[fol. 704] Q. ——having office space in a retail office?

A. Having office space in a retail office, that is correct.

Mr. Harkey: Back to you then.

The Witness: Off the record, that is what we are trying to get rid of in Iowa.

Mr. Harkey: How about having that in the record, "That is what we are trying to get rid of in Iowa."

Cross-examination.

By Mr. Daugherty:

Q. Doctor, you feel that the public welfare is served whenever you can keep examinations of anything as precious as eyesight on a strictly professional basis?

A. Yes, it should be on a professional basis.

Q. Do you think that is good for the public welfare and public health of the citizens of any given community?

A. That is right. I am in favor of anything that will improve public health, and of course there are many ways in which information can be gotten to the public, as we talked about a little while ago.

Our best way in medicine is through the public health [fol. 705] services and through the entire public health service group at county levels and other places in which public information—the public is informed that so-and-so is available, that such eye examination is available, and where it can be obtained.

Mr. Daugherty: I have no further questions.

Cross-examination.

By Mr. Harkey:

Q. Doctor, in general is it not true that certain standards of unethical and unprofessional conduct on the part of a licensed optometrist or a licensed ophthalmologist may result in their having their right to practice those professions taken away from them? In other words, an optometrist or an ophthalmologist who is operating on a non-professional or commercial basis can have his license taken away from him, is that correct, sir?

A. In most states that is correct.

Q. Do you think that the law ought to require that non-professional people who are working rendering service as a part of visual care should have the same restrictions placed upon them as are placed upon those who are qualified to [fol. 706] render visual care?

A. Well I would think so. That is why I am in favor of course of a registration and examination law for opticians.

Q. And you think the same restrictions on advertising and solicitation of business should apply to all people who deal in optical appliances as applied to ophthalmologists and optometrists?

A. I still don't object to the advertising of the American Optical Company.

Mr. Daugherty: But they are not selling.

Mr. Harkey:

Q. Doctor, I think we distinguished that earlier as being ethical educational publicity.

A. All right.

Mr. Phillips: Read the rest of the sentence too, while you are reading that.

Mr. Harkey:

Q. In other words to distinguish bait advertising, is it not true that the advertising which you approve does not result in a person entering a specific establishment?

A. That is correct.

Q. Now, Doctor, you are opposed to any type of advertising that would cause a person who thought they might need visual care to walk into the doors of a specific non-profes- [fol. 707] sional establishment?

A. That is right.

Mr. Harkey: That is all.

Cross-examination.

By Mr. Daugherty:

Q. Doctor, do you know how many professional men are in attendance at this convention, this national convention?

A. Not for sure, but there are——

Q. What is your best estimate?

A. Oh between three and four thousand.

Mr. Daugherty: Thank you.

Mr. Phillips: Doctor, I have just a couple of questions I would like to ask you.

The Witness: Yes.

Redirect-examination.

By Mr. Phillips:

Q. You testified that you had no objection, in your opinion there was nothing against the public interest in a professional optician of the type you use having modest window displays, is that correct, sir?

A. That is correct.

[fol. 708] Q. Do you know whether the professional opticians whom you use insert their names as professional opticians in telephone directories?

A. Yes.

Q. Do you have any objection to that kind of advertising?

A. I have no objection to that kind of advertising.

Q. Is your objection to advertising directed to that kind of advertising which is misleading or induces persons to look to unprofessional people for professional care?

A. That is correct.

Q. But advertising which doesn't have that tendency, such as you have seen in your own professional opticians, is it in your opinion objectionable?

A. That is not objectionable.

Q. Yes, sir.

Mr. Phillips: That is all, sir.

Mr. Daugherty: I object to all of those questions as being leading and suggestive, and not being the testimony of the witness but rather the testimony of the attorney.

Mr. Phillips: Any further questions?

You have a right, sir, to read the deposition and sign it, [fol. 709] or you may waive the reading of it and signing of it.

The Witness: I prefer to read it if it is at all possible.

Mr. Phillips: The clerk would provide for that, and you would have to come to Chicago in order to sign that.

Mr. Daugherty: We will agree that if it can be done, that the clerk can mail it to the doctor at his home.

The Witness: That is right.

Mr. Daugherty: And he can sign it.

(Discussion outside the record.)

Alson E. Braley, M. D.

[fols. 710-712] Certificate of Notary Public to Deposition.

[fol. 713] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

DEPOSITION—October 21, 1953

[fol. 714] DR. ALBERT N. LEMOINE, JR., of lawful age, produced, sworn and examined as a witness on behalf of the plaintiffs, deposes and says:

Direct examination.

By Mr. Phillips:

Q. Will you state your name?
A. Albert N. Lemoine, Jr.
Q. Will you state your profession or occupation?
A. Ophthalmologist.
Q. Will you state, Doctor, the degrees you hold?
A. I have an A. B. and an M. D.
Q. From what universities?
A. A. B. from the University of Kansas, and M. D. from Washington Medical School, St. Louis.
Q. Will you state the professional associations of which you are a member?
A. All of them?
Q. The most important ones.
A. Well, the County Medical Society, Wyandotte County, Kansas State, A. M. A., and the Kansas City Eye, Ear, Nose and Throat, American Academy of Ophthalmology, Association for Research in Ophthalmology, Pan-American Congress of Ophthalmology, Diplomat of the American Board of Ophthalmology. That is all I can think of right now.
Q. Are you associated with the University of Kansas?
A. Yes.
Q. In what capacity?
[fol. 715] A. Professor and chairman of the department of ophthalmology.
Q. As chairman of the department of ophthalmology, is it your duty to instruct in ophthalmology in the medical school of the University of Kansas?
A. Yes.

Q. Have you practiced, or are you practicing, are you a practitioner of ophthalmology?

A. Yes.

Q. Doctor, are you familiar with the general scope of the activities of opticians?

A. Yes.

Q. You are, of course, or are you familiar with the general scope and practice of ophthalmologists?

A. Yes.

Q. Do ophthalmologists prescribe eyeglasses?

A. Define what you mean by prescribe.

Q. Do they issue a prescription for the lenses for eyeglasses?

A. Yes.

Q. Would you state what is included in the prescription for lenses for eyeglasses issued by an ophthalmologist?

A. I can state for myself, and I think probably the majority of men in this area, that it consists in the strength of the correcting lens only.

Q. Does that prescription contain any data respecting the frame?

A. Not in my practice, and I think that relatively few men in this area do that, prescribe as to a type of frame, or anything of that nature.

Q. In your judgment is it advisable to include data re- [fol. 716] specting frames in a prescription for eyeglasses?

A. When dealing with a dependable optician, which is the obligation of an ophthalmologist, I don't feel it is necessary at all.

Q. Does your prescription for eyeglasses contain the interpupillary distance?

A. No, not my regular prescriptions.

Q. Where do you expect the interpupillary distance of a patient's eyes to be determined?

A. By the optician.

Q. Does your prescription for eyeglasses contain any data respecting the angle of the lens to the frame, or the earpiece?

A. No, it doesn't. Basically, you can't determine until after a person has a frame. It has to be adjusted to their desires, so you can't write it in a prescription. You don't know what it is going to be for an individual patient.

Q. In your opinion, Dr. Lemoine, what are the proper functions of an optician?

A. I think the proper function of the optician is, No. 1, to select a proper frame for the patient; No. 2, to correctly measure the p. d.

Q. By "p. d." you mean interpupillary distance?

A. Interpupillary distance, and also proper measurement [fol. 717] of the height of the bifocal in the particular frame that is selected. The third one is to see that the dispensed lens, in other words, the finished product that he gets before he gives it to the patient, is properly ground to the prescription; and the fourth one is to see that it is properly adjusted, realizing that—I think it is all-important, in my patients—that particularly in bifocals they be told that it may require two or three visits, because it is an individual adjustment to the patient, and it is their function to work with these adjustments after the initial adjustmen., it is their function to make future adjustments on the frame.

It is the physician's obligation, though, that if the patient is dissatisfied or has discomfort in any way, that the patient be so instructed, that they are to return to the physician.

Q. Will you describe, Dr. Lemoine, how the optician takes the interpupillary distance?

A. Well, that will vary widely according to the optician. Actually it boils down to one thing. It is a measurement of the distance between the two eyes. Now, there are innumerable gadgets that may be used to measure this, and it varies from optician to optician. You can do it with such a simple thing as a plain ruler, or any of the more fancy gadgets, but [fol. 718] it consists in measuring the distance between the center of the pupils of the two eyes and, further, they should measure the distance of the eye individually from the center of the nose.

Q. Is it difficult to take that measurement, Doctor?

A. No, just take the ruler where the line is on the cornea, just measure that distance, it comes right out on the ruler.

Q. Is that a task which can be performed, in your judgment, by a skilled craftsman?

A. Well, to me that is what an optician is, a skilled craftsman.

Q. Doctor, you have testified that one of the functions of an optician is to select a proper frame?

A. Yes.

Q. Will you tell us what procedures the optician employs in selecting the proper frame?

A. Well, this whole matter of frame selection—there is no such thing, in my opinion, as a single frame to fit any patient. It is becoming progressively more apparent that with the wide choice of frames, the cosmetic factor with the patient is the all-important one. In other words, the patient can select a frame that they wish as far as color and shape, and almost without exception either a frame is available that can be adjusted to that patient, or the frame can be altered to fit that patient, such as putting pads on one that didn't [fol. 719] have pads, or removing pads from one that did have them. I think it is very important in selecting a frame that the patients themselves be allowed to make a decision as to the shape, basically size, unless they go too far off as to too large or too small, and certainly as to color.

Q. Why do you think that is important?

A. Well, I think it is important because if you have to wear glasses you had just as well wear something that you like the looks of, and that is one of the greatest problems for everybody in the fitting of lenses is to satisfy the cosmetic desires of the patient. But it can be solved, and it is just a matter of having an adequate selection and then the optician can go right ahead and, either with adjustment of the frame or some addition, make any frame fit any face.

Q. Does the selection of the proper eye size involve technical skill?

A. When you get right down to it, I think the selection of the eye size is dependent altogether on the frame that the patient selects. In other words, that is why, as far as I am concerned, I would never write an eye size down, because what may look good in measuring it on a patient's face, when you actually select a frame it may not work at all. If the patient decides, for example, they wish to have a rimless glass, as a general rule the eye size will have to be larger [fol. 720] than if they select a plastic or frame of some other type, because if you order the same size lens in a rimless glass and a frame glass, they are going to look entirely different on the patient's face. As soon as the lens is put in a frame, a full frame, it is going to look much larger, and

that is why I feel quite strongly and, in fact, around here we stress to our residents that if they are using an optician for their work, that they should not limit him by stating the eye size, because that automatically handicaps him in his selection of frame, because if the patient wishes a plastic frame or decides one of the shapes is a little better so far as he is concerned, if you specify the eye size you may make it impossible for him to give the patient what he wants. Actually there is a very wide latitude in the size of the lens that a patient can wear, and we can look back to, you might say, the Ben Franklin days, when lenses were much smaller, and yet fulfilled their function perfectly all right, till we get clear up to the aviator's and golfer's with the very large goggle lenses. All of them will perform the function perfectly all right.

Q. So that, if I understand you correctly, Doctor, this wide tolerance in eye sizes means that there is large room for discretion?

A. Yes.

Q. In granting the desires of the patient?

A. Oh, yes, very wide.

[fol. 721] Q. Does the selection of the bridge size involve a technical problem?

A. Very definitely, and the problem is, in my experience, definitely one of measurement being the thing that may give you more trouble than anything else, because when you get to the bridge, what you can measure, just look at anybody's nose, the bridge of it is one width and the base of it is another width, and it depends on the type of frame they select as to where that is going to rest on the nose.

One of the greatest problems we run into is the prescribing of safety lenses where they require such a measurement, and the patient may be allowed to get a metal frame or a plastic frame, and if you put down a definite measurement that is measured in the accepted manner without trying the frame on a patient's face, too often the frame is either too narrow or it is too wide, and I still think the only good method of doing it is not a measurement, but rather the trying of the particular frame on a person's face and seeing how that fits their nose, and there is no way, to my knowledge, devised that you can measure that at all. It is more

or less a trial and error and depends altogether on the frame construction and the type of pad, whether they use a pad or no pad, that determines that factor.

Q. Would you say, Doctor, that it is a fitting operation?

[fol. 722] A. Yes, it is just a mechanical fitting.

Q. Is it comparable to the fitting of a pair of shoes to the human foot?

A. Same thing exactly you have to fit it so that it is comfortable to the person's nose. That is the basic thing first, then minor adjustments can be made by bending the frame or adjusting the pads.

Q. Is the optician qualified, in your opinion, to perform these functions you were describing?

A. In my opinion he very definitely is. He can do a lot better job than I can.

Q. Why do you say that he can do a better job than you can?

A. Basically because he is limiting his work to that. I mean that is all he does is fit those frames. An ophthalmologist, in the majority of instances, the refracting aspect is only one phase of his practice, and most of us are unable to devote sufficient time to it, and as far as I am concerned, it is a technician type of a job, or craftsman type of job, and does not require medical training or anything else to do it. It is something that a person that does it every day should be able to do very well.

Q. Will you describe the technical problems, if any, involved in mounting lenses in frames?

A. Most of the frames they just snap in and take one or [fol. 723] two screws. The rimless glasses have a hole you put a screw in. Some of them have a clamp, but the only thing that can happen is that you might break a lens in putting it in. There is no particular skill. You see that all the time, patients come in, their lenses drop out, they put them in themselves.

Q. Will you describe the technical problems involved in duplicating a lens?

A. Well, in merely duplication—you mean a broken lens or something of that nature?

Q. Yes, sir, or duplication in the sense of maybe a companion——

A. (Interrupting:) It is a very simple thing to duplicate a lens, because it is done with a lensometer, which is an optical gadget that measures the two focal areas of the lens, and it simply consists of putting a fragment of the lens or the whole lens in the lensometer and focusing—most of them are devised as lines, a series of lines in one axis and one line in an opposite axis, although some of them are dots. Just consists of looking in, getting the lines of focus of one meridian on the dial, one side of it tells you the strength of each meridian, and the second side records the axis of astigmatism. You can teach it to a nurse or anybody else. In fact, most men that I know, optometrists and ophthalmologists, don't do it themselves, they have their technicians [fol. 724] or nurses or some assistant trained in the mechanics of telling you what the lens is, and once you get that figure, what that fragment or lens is, you write a prescription just as you wrote the original prescription, and it is ground from that prescription.

Q. Does the operation of the lensometer involve skill?

A. It all depends on what you mean by skill; not very much skill. For example, around here, we can take our student nurses on the floor, and most of them can be shown how to do it.

Q. How long does it take you to teach them how to do it?

A. Forty-five minutes, an hour, something like that. If anybody has any mechanical sense at all of turning handles, that is all it is, and looking in to see where there is something to focus.

Q. Will you tell us the factors concerning the lens which the lensometer determines?

A. Well, it tells two things. One of them is the strength of the lens and the other, the second feature of it, it will determine the axis of astigmatism. The matter of the axis of astigmatism you have to consider in the light that if it is a broken lens and a very small fragment, the only thing that you can determine is the spherical and cylindrical power, you can't determine the axis because you don't know the position that fragment was in the full lens. However, if you [fol. 724] have a full frame where the lenses are not broken, you can not only determine the sphere and cylinder of the lens, but also determine the axis of that cylinder within that

particular frame. But in fragments you can't determine. You can tell what the cylinder is, but you can't tell where it was sitting originally.

Q. In your judgment, Doctor, is the performance of the functions which you have described in duplicating lenses, is that a function which may be competently performed by opticians?

A. Yes.

Q. Now, Doctor, are there any other important functions of an optician in addition to those which we have discussed, which involve technical skill?

A. I think we have discussed them, as well as I can offhand think of it. We have discussed most of their functions. Maybe someone else can think of one, but I can't.

Q. Will you describe the technical problems involved in determining the angle of a lens to the frame, in the frame?

A. You mean the problem of making that adjustment or determining what it should be?

Q. Determining what it should be and making the adjustment.

A. Well, No. 1, in making the adjustment, that depends on the frame. If it is a metal frame the adjustment is merely made by bending, by a pair of pliers and bending. If it is a plastic frame, it sometimes entails dehinging the lens [fol. 725] and filing off one edge of it, because the plastic won't bend in the usual manner. Neither one of them is a particular problem. In one case you take the pliers and bend it, in the other take a file and file it off, then bend the hinge.

Now, as to determining the proper angle at which it is to be set, I know of absolutely no method that can be predetermined. The only thing that you can do is put it on an average position, and then you ask the patient to wear it for a few days, and then if they have difficulties, to come back and tell you, and then it is a matter of telling—they say they see the frame down here at the bottom when they read, it is just a matter of tipping it a little bit more. As far as I am concerned, it is something that can't be determined before a person gets the glasses. It is something that has to be made after they get the glasses.

Q. Will you state what the factors are which are impor-

tant or what the effects are which result from the angles of the lens which are important?

A. Well, the effect, except in extremely high corrections, which is an unusual thing, extremely high cylinders and spheres, the effect is really, from a practical standpoint, nil or minimal, I should say, not nil.

Q. Is that because of the tolerance?

[fol. 726] A. It is because of the tolerance of the eye and the acceptance of the person to change their habits. The theoretical idea in the tip of the lens is particularly true in a bifocal where you have two optical centers. The theoretical idea in tipping the lens is that when the eye is turning in a downward position for reading, the visual axis will pass through the lens perpendicular to its surface rather than at some off angle. But in my experience, from the practical standpoint that is too much tilt for the average patient. The average patient does not like that much tilt in the lens. Where you would theoretically calculate that it would take a tip of about 17 to 20 degrees, most people will not tolerate that much tip, they want it more nearly a flat surface.

Then, again, that is extremely variable according to the patient's face, their reading habits, if they hold it up here (indicating) it is one thing, down here it is another, and you can't pre-determine that, you just have to let them sit in the office, when you check them you say, "Hold the card just the way you want to read," and about half the time you can depend that they won't put it that way, they are in an artificial position and they won't put it in that spot, they will come back, say it is too high or too low. So, again, it is an individual quality that is determined only after they get [fol. 727] their glasses, and the proper function is that when they have trouble you make the adjustment to that individual.

Q. By having trouble do you mean that the eyeglass is at an angle which is uncomfortable?

A. The patient coming back and stating that they don't feel comfortable, that is the whole thing. The words they use to describe it, they just are not satisfied. You might put it that way; and one of the things you must think about when they are not satisfied is the fit of the lens and the tip of the lens is one of the factors.

Q. Now, Doctor, in your judgment is it necessary for an optician to perform these various functions which you have described, to have the training of an opthalmologist?

A. By definition, no. The ophthalmologist by definition is one trained in medical and surgical treatment. The fitting of a glass to a face has absolutely nothing to do with medical or surgical treatment of a patient, and the definition, as far as I interpret it, itself, tells you that they have that training.

Q. In your judgment, Doctor, is it necessary for an optician to perform these functions to have the training and education of an ophthalmologist?

A. No, definitely not.

Q. An optometrist performs some of these functions, does he not, Doctor?

[fol. 728] A. The optometrist in my opinion has two functions. Function No. 1 is to refract the eye for glasses; function No. 2 is the mechanics of adjusting the lens that the optician does, so he is really functioning in a double manner, as far as I determine the optometrist's function. His special training entails the prescribing of the lens, the refracting of the patient, which an optician, by definition, should not do, and is not trained to do, but when one determines the strength of the correcting lens by what is commonly called the refraction, that is his function, and it is something entirely different to the fitting of the frame, and as soon as you start fitting the frame to the face, whether you are an optometrist or an ophthalmologist, in my opinion you are simply functioning as a dispensing optician. That is what that service you are rendering is.

Q. In your opinion, Doctor, is it necessary for an optician to know how to refract eyes or issue eye prescriptions to do his job competently?

A. Definitely not. I mean by pure definition of the way you do it, that is not a function that I would accept at all for an optician to do.

Q. Doctor, do ophthalmologists generally duplicate lenses for eyeglasses?

A. Well, that depends altogether in the community. In a [fol. 729] city such as Kansas City, or any larger city, I know of none that do. In a small community by necessity they must. So you can't give a flat statement. It depends

altogether on the size of the community and whether an optician's services are available.

Q. In Kansas City, for example, where an optician's services are available, and should a patient ask an ophthalmologist for a duplicate lens or to duplicate a lens, what would he do?

A. If your patient calls and asks for duplicate lens?

Q. Yes, sir.

A. You have two alternatives; one of them, if they know the optician to which they went, just tell them to go back and get it. Now, most all companies in this area have copies of records going back for years, and there is usually a card on each patient and each subsequent change as made, and if they wish to duplicate a lens I rarely send another prescription for it, if they go back to the original optician. If they don't know or they say they think they went to some optician, I tell them to stop by and the girls will have a prescription for them. But we have some very reliable ones here and it has presented no problem as to the necessity of rechecking the patient or anything like that. Strange as it may seem, one of the greatest problems is two or three years [fol. 730] later for a person to remember where they went to get them.

Q. If the patient went directly to an optician who employed the lensometer, would he be satisfactorily treated?

A. Yes; I mean the optician with the patient's glasses can adequately fill the prescription.

Q. In a city such as Kansas City, Doctor, if a patient asked an ophthalmologist for a duplicate set of eyeglasses, what would the ophthalmologist do?

A. I think the average ophthalmologist would just say go back—the first thing they ask them is if their present glasses are satisfactory, and if they say yes, you say just go back to the optical company or optician and have another pair made. That is true in Boston, too. My experience basically is for the Boston area and the Kansas City area, and we have exactly the same set-up as there. Now, if it has been a long period of time, you may request them to come in and be checked up again.

Q. Doctor, do competent opticians in Kansas City and Boston do that kind of advertising?

A. Oh, yes, sure, but it is very—usually it is just quiet. Now I mean it is usually a very modest ad. It just says "Dispensing optician," and the name of the company. They don't go for full page ads, or anything like that.

Q. But they do use modest forms of advertising?

A. Oh, yes, sure.

[fol. 731] Q. Do such modest forms of advertising appear in newspapers?

A. Yes.

Q. Do they appear in telephone directories?

A. Yes.

Q. Do such opticians use window displays?

A. If they are on the ground floor, they do.

Q. In your opinion, Doctor, is the use of such modest forms of advertising contrary to the health and welfare of the public?

A. No, I don't think it is at all.

Q. Doctor, is it customary for opticians to maintain a stock of frames, lenses, and other paraphernalia of eyeglasses in their stores?

A. Well, the frames, yes, they usually have quite a selection of frames. As far as lenses, it will depend greatly upon the volume of business. As a rule most of them will do what they call stock the simple corrections, but I think in this area in the majority of instances they probably do not widely stock the lenses themselves except for the simple ones, but rather have them ground individually to the prescription. It makes no difference which way they have them. It is mostly a matter of capital investment whether they have a whole lot of ground lenses on hand or not.

Q. One further point, Doctor. Is the optical center of a lens blank pre-determined by the manufacturer?

[fol. 732] A. No, no, they can be adjusted.

Q. Of a lens blank, I asked.

A. Now, if you mean the lens blank before grinding, it is simply a parallel surface, lens has no power, and the center of that lens is determined by where you grind the center of your correction. In other words, if you have a large sheet and you grind it clear over here (indicating), there is going to be an optical center over here somewhere. Now, it is indirectly pre-determined because the blanks are made of

relatively small size, so you can shift it only so far, so it will be within a relatively small range.

Q. Doctor, you have testified that it is the normal function of an optician to perform the fitting and adapting of frames to the face of the patient or customer, is that correct?

A. Adjusting, did you say, or adapting?

Q. Fitting and adjusting.

A. Yes.

Q. In the event that an optician makes an error in fitting or adjusting the eyeglasses to the face of his customer, is the customer likely to sustain any physical injury?

A. No, I know of no case on record that a poorly fitted lens ever produced any organic damage to the eye. It just produces discomfort, and in a mild degree, at that.

Q. Doctor, is there any relation, in your opinion, between the competency of an optician and the occupation of his [fol. 733] landlord?

A. What is that?

(Question read.)

Q. Let me explain that question, Doctor. The statute with which we are concerned in this litigation prohibits any person engaged in the retail business from leasing space in his retail store to a person engaged in the occupation of prescribing glasses, eyeglasses.

A. Well, in so far as the competency of the individual, I think that is the way you worded the question?

Q. Yes.

A. It is my feeling that a person can work under any conditions anywhere and still be, you might use the term intellectual honesty—the working conditions have nothing to do with it. If you look at it in that aspect, competency is an individual quality in a person, as far as I am concerned, and if they have character they can work anywhere, middle of the street or any place, and they can still retain their ability to work perfectly all right. So I would say in a general manner that way it should make no difference, because I still think that the whole thing is a personal function, and whether I like the idea or not is a different thing, but I see no reason why a person couldn't be completely competent working in a retail store or anywhere else, as far as his competency is concerned.

Q. In your opinion, would your statement include an [fol. 734] optometrist?

A. I think it applies to anybody in any function of life. If they are ethical and have high standards, they can be competent any place, and if they aren't that way it won't make any difference where you put them, they are not going to be.

Q. Doctor, are you familiar in the course of your work with the University of Kansas with the numbers of ophthalmologists in general avaiiable in the mid-western areas?

A. In the mid-western areas?

Q. Yes, sir.

A. Honestly, it would be more of a guess as to how many ophthalmologists are available in the mid-western area.

Q. Would you be able to say whether there was an adequate supply of ophthalmologists or an inadequate supply of ophthalmologists? Would you be able to say that much, of your knowledge?

A. Well, I think—I would like to have it pinned down a bit more in what you mean by ophthalmologists being adequate. Do you mean by that statement are there an adequate number of them to take care of all the public if all other groups, the optometrists, for example, were put out?

Q. No, sir, by that statement I mean are there an adequate number of them to take care of the people who request the services of ophthalmologists?

A. I think either there are or quite close to it. I say that [fol. 735] because I know of people that could do more work in the area, that is, some are busier than others. Certainly in our locale around here I think there are very few areas in which it is not available to people if they wish it.

Q. Would you be able to make the same statement if ophthalmologists were required to engage in the detail of fitting glasses to the face or supervising the fitting of glasses to the face?

A. That would be absolutely hopeless. The ophthalmologist couldn't begin to do it. If you had to fit the glasses to the face, take that mechanical function, you could figure you would have to reduce your practice by a good 50 percent.

Q. In the event that that were to happen and the ophthal-

mologists were required to thus reduce their practice, where could those patients receive their eye examinations?

A. Well, the most serious thing that would entail from such a problem is that you would have an inadequate number of men to take care of the diseases of the eye. That would be the most serious thing. Now, the refracting aspect, checking of glasses, I don't know for sure, but I assume that there are sufficient optometrists for the mechanics of just fitting glasses, that the matter could probably be solved for fitting glasses, but there certainly would be a serious prob- [fol. 736] l m arise from the surgical and medical treatment basis, because it depends a lot on the office but in my practice the medical and surgical treatment constitutes 80 to 85 percent of it. If I had to do all this other thing it would cut down markedly on that. There is nobody then that could take over the function of that which is part of the total eye care of patients as I see it.

Q. Doctor, you have testified that the ophthalmologist is near or close to the saturation point with respect to the number available. In your opinion, if the requirement that ophthalmologists adapt or fit eyeglasses to the face were imposed, would the ophthalmologist tend to eliminate the examination of eyes from his practice and concentrate on the treatment of eye diseases because of the importance of the factors of which you have discussed?

A. Certainly a percentage of them would. I don't know how high the percentage would be, but I mean you would have absolutely no alternative. In my own particular case, if such a situation ever did exist, there is no doubt what I would do. I would quit the refracting aspect because my training and my duty to the public, as I see it, is far more in the medical treatment than it is inspection of glasses.

Q. If ophthalmologists quit the refracting aspect, is there any group other than optometrists who would be able to [fol. 737] perform that service for the public?

A. I don't know the technicalities of the law, but I don't know of any other group that could legally do it.

Q. In the event that the ophthalmologists, by virtue of the requirements of such a law, were to reduce or restrict their examination of the eyes, would that have any effect upon the business of the opticians?

A. You said in the event that the ophthalmologists were required——

Mr. Phillips: Read the question, please.

(Question read.)

A. Naturally it would because they are dependent basically upon the ophthalmologist's prescription to be in business.

Q. Do opticians receive business from optometrists?

A. Probably you will find some place where it might happen. I doubt very seriously that there will be very many cases of it, though. The ones that I know personally, some four or five in Kansas City that I know personally, I have never heard them mention that they got prescriptions from optometrists, because in this area the practice is that the optometrist does the refracting and in addition to that he does the fitting of glasses. That is just assumed, that is what he is going to do.

Q. Would it be your opinion, then that anything which induces or causes ophthalmologists to restrict the number of eye examinations they gave automatically result in [fol. 738] elimination of business for the optician?

A. It would automatically, because I am sure that I could safely say that over 90 percent of their business is from ophthalmologists.

Mr. Phillips: That is all. Mr. Daugherty will have some questions to ask you.

CROSS-EXAMINATION.

By Mr. Daugherty:

Q. Doctor, are you familiar with the legislation involved in this litigation as to which you are testifying?

A. I have heard about it in a general manner. As to specific details, I am not certain as to them. I have never read the law, if that is what you mean.

Q. You have never read or studied the law?

A. I have never read or studied the law.

Q. Doctor, I believe you are not only an instructor in ophthalmology, but you are likewise a practitioner?

A. Yes, I am half-time teacher and researcher, half-time practitioner. I practice outside the institution, it isn't an institutionalized set-up. My private office is outside of the hospital.

Q. You run your own private office where you have your own private patients?

A. I have; have the financial obligation, and everything. In other words, it is completely separate from the University.

[fol. 739] Q. Now, you have testified about writing prescriptions after making an examination. What do you usually do with your prescriptions, Doctor, after you write them?

A. The No. 1 question I ask them is if they have a preference of optical companies or opticians which they would like to go to. In this particular area rather a high percentage of the patients seem to be indifferent, they say it makes no difference to them. Because I practice at the Plaza, which is, you might say, a suburban area, I then tell them—give them their choice of, you might say, some four or five optical companies and opticians that have been satisfactory in their work, and tell them I prefer them to select one of that group, and it is as much as anything geographical. If you wish to go downtown, go there, or the Plaza or 63d and Brookside, or Prairie Village. It is a matter of trying to help them geographically, but I try to control it only in so far as going to places where I know I can get dependable service.

Q. Do you customarily have the patient run to your office after receiving glasses from the optician?

A. Routinely, no, if they go to one of the optical companies I have confidence in. My instruction to the patient is if they have any difficulties of any type or any complaints after 10 days or two weeks, that I wish to see them in my office, and working on that basis—I formerly did, but it [fol. 740] becomes a burdensome problem and when dealing with reputable opticians and optical companies, the problem is minimized completely on that basis. But I am reasonably certain it works satisfactorily because practically all the ophthalmologists in Kansas City are on my staff here, and we are quite close friends, and if the patients are not satis-

fied they end up in some other office, and you find that there is very little shifting of patients because of dissatisfaction, so the system in this area seems to work satisfactorily.

Q. Do you elicit any assurance from your patient when he leaves your office with your prescription that he is going to some optician that you know——

A. Do I what?

Q. Do you get any assurance from your patient that he is going to an optician that is dependable?

A. Yes, my patients, by far the majority of them, I tell them where these are, and I ask them which one they want, and only a single name is written in longhand on the back of it. I do not use any type of printed prescription in so far as the address of an optician on it, and I write it in longhand, and I ask them which area they want to go into and which one of them they want, and that is the one address that they have, and I am quite certain that by far the majority of the patients do go to that place. The ones that [fol. 741] don't go to it are usually very—I mean if it doesn't work out and they come out, they usually tell you they didn't go where you recommended.

Q. Do some of your patients return to you after their glasses are received from the optician for a check-up?

A. Last year in our office we kept track of it, and approximately between five and seven percent of the patients had some type of difficulty in which they did return with questions. Now, most of them were due solely to very marked changes in their glasses, and they hadn't adjusted to it. In my experience last year I had only one patient return in which there was an error in the prescription. When they come back I check the lenses to see that they are ground properly. I had one case in which I couldn't exactly blame him, because my 5 was exactly like a 2, the way I put it looked like 1.50 instead of 1.20. I told him I thought he should have been able to figure it out, but that is the only mistake I had last year in the grinding of a lens.

Q. In some of your examinations and prescriptions do you sometimes prescribe glasses on an off axis?

A. Off axis meaning off axis astigmatism?

Q. Yes.

A. Well, quite frequently there will be, because the term

"off axis" means that the axis of the cylinder is at 180 or [fol. 742] at 90, and as generally used the term "off axis" is anything around—180 or 90 is off axis.

Q. My question was you sometimes prescribe glasses that are off axis?

A. Well, now, I want you to describe axis. Do you mean what I am talking about, 180 or 90?

Q. Yes, we are talking about the same thing.

A. Yes, if that is what the refraction takes, I do prescribe it.

Q. Do you put that information in your prescription to the optician?

A. You have to, you can't put a cylinder down without an axis. I mean if you just write cylinder, no axis, they can't fill it, they have to call you and ask you what it is.

Q. I understand that. These questions may seem a little bit stupid to you, but I am just asking you if you do put that information in a prescription?

A. You have to, yes and if you don't you can be sure they will call you up and ask you what axis it is supposed to be in.

Q. Do you ever put in your prescription any information as to the distance that the glasses or lens should be placed before the eyes?

A. That, again, in my opinion, is a measurement that cannot be put down, because it depends altogether on the frame selected, and the determining factor is usually the [fol. 743] eyelashes, how far they protrude, and you can't determine that until you have the lens mounted in the frame or at least you have the frame, I should say, without the lenses, in front of the face, and see whether it interferes or not. So you can't pre-determine that unless you go so far as to limit them to a single frame and have that frame—put it on their face. You have to measure it on the patient's face. I don't believe that should be done.

Q. Do you ever put in your prescriptions any data as to the distance the lens should sit before the eyes?

A. No. The only data I put on it is the sphere, cylinder and axis, and the bifocal, if required.

Q. Plus information about the axis if it is off axis?

A. Well, that is the axis, the sphere, cylinder and axis.

Well, that will be a number, anywhere from zero to 180.

Q. Doctor, has it been represented to you by anybody that this Oklahoma law puts the dispensing optician out of business in Oklahoma?

A. No.

Q. You don't labor under that impression?

A. I haven't read the law, so I don't know what your particular law does.

Q. You don't have that impression at the present time?

A. I don't know.

Q. If I should take one of my lenses down to an optician and it is an off axis prescribed lens, and it is broken, an attempt is made to duplicate that lens, would the optician [fol. 744] know how to put it back in the frame properly?

A. Your lens is broken?

Q. Yes.

A. How much of it is left?

Q. Well, let's say half of it.

A. Half of it. If there is a half of it, he might be able to. It all depends on whether he can put the lens in the lensometer, in the original frame. If you break the lower half of your lens off and you went in he could determine if the upper part was still in position, because then it is in its frame. If, however, you went in with just the jagged triangular fragment from some place in the middle of it, he would be unable to put it in unless he had the prescription.

Q. The lensometer itself can't show you the correct axis if it is off axis?

A. Sure it can, if it is mounted in the frame.

Q. I say not in the frame, though, Doctor.

A. Not in the frame. Now, let's see, the lensometer cannot show you——

Q. The correct axis, if it is off axis, if you don't have the frame, just the lens?

A. Nothing can tell you that unless it is mounted in the frame or unless you have a sufficiently large segment of the lens that you could be reasonably certain. I me. [fol. 745] if you have a broken rimless glass that has two holes ground in it, and the top is perfectly flat, then you could put it in and get it probably within one to two degrees

of it, you wouldn't be off more than that, if you have sufficient periphery to tell you where to put it.

Q. But there might be cases where you wouldn't have enough of the lens?

A. In my experience, they will never fill such a prescription. They will call the physician and if it is a person that is traveling through——

Q. What about Oklahoma, can you testify about conditions in Oklahoma?

A. I have no idea of Oklahoma, I am testifying in this particular area. I know it, because——

Q. The point is——

Mr. Phillips: Let him finish.

A. I know it because of experience with the optical companies. When a traveler comes here, for example, goes down to one of them, they will call up, they will say they have a fragment, wonder if it would be safe to fill it, or something of that nature, till they got home. So I feel that by far the majority of them in this particular area are very good about not filling such a prescription unless they are quite certain that they can determine the axis.

Q. If they undertook to fill it, it would be a bad practice [fol. 746] for the eyes, would it not?

A. No, not for the eyes, now. If they——

Q. Well, for the patient then, in order to be properly fitted with glasses, it would be a bad practice?

A. I think, again, it would depend entirely on the circumstances. If it was a business man, he had to have something and he was——

Q. I am not talking about that.

Mr. Phillips: Let him finish his answer.

A. And he was told, "This may not be proper, but if you have to have it until you get home, or until you get an examination—it may not hurt the eyes, and it may save a business man a big deal. We run into it most strikingly every summer when people go to Europe and break their glasses in Europe, to get them something filled to get them by until they get home; or break them on a boat, something like that. It won't hurt the eyes, but it isn't a practice——

Q. The man would still not be properly fitted with glasses,

would he, if he has a pair of glasses with an incorrect axis?

A. Personally, I object to the term "properly fitted." The tolerance of the human eye for a lens is remarkable. In fact, it is practically fantastic when you practice medicine and you see what people are wearing and what they can wear with no complaints at all. So actually one of [fol. 747] the—to my way of thinking, one of the fallacies that exists in the whole matter of refraction is the assumption that the human eye is exactly like a photographic camera, and you give the eye no tolerance. The known fact is that anybody that really works with the eye knows that there is quite a tolerance. That tolerance is what can save a person when they get in jams like that.

Q. Do you have any opinions as to how often a person ought to have his eyes examined, once he has been fitted with glasses?

A. I have quite strong opinions on that. It is based on several things. No. 1, the age of the patient. Glasses do two things, either make you see better or make you feel better. They don't cure diseases, or anything else. From say seven or eight until roughly 45, unless a person has a very abnormal pair of eyes, the average person can go seven to ten years between examinations, unless they develop symptoms in the meantime. Most of them can go seven to ten years. After the age of roughly 43 to 45 for the next ten years, they need a check usually about every two to four years, they will change somewhere between two and four years. After the age of 55 to 60, it is my feeling that they probably should be checked about every two years, not for their glasses, but to check for glaucoma and diseases of senility. In other words, checking their [fol. 748] tensions, and so forth, to try to pick up diseases early. But in the greater span of your life it is unusual that you need a change in less than three to five years, and in your middle segment of life, in your middle teens to your forties you can usually go eight to ten years unless you have a very abnormal pair of eyes. Of course there are always individual exceptions.

Q. Doctor, in your opinion, do improperly adapted glasses bring about a nervous condition sometimes in a patient?

A. Well, the term "nervous condition" is so ambiguous that I would like to have just what you mean by a nervous condition.

Q. Well, I think you will have to answer that. You are a doctor, I am not. I am merely quoting from a case where——

A. Well, nervousness is a subjective symptom of the individual. Rarely can a physician of any type, anybody, objectively look at a patient and say, "You are nervous." It is a sensation that a patient has. Now, some people get nervous driving a car, some people get nervous at a party. Wearing glasses with a poorly fitting frame, something like that, can make some people nervous, but you can be reasonably certain of this, that the person who comes in and is all nervous because of the glasses, one who comes in to get little adjustments, to the optician, every week, you can be quite certain that that person has quite profound nervous tendencies. That is just one of them. That same per-[fol. 749] son usually has an upset stomach and a lot of other things that goes with it. Nervousness is an entire person, all the things. One factor can be improperly adjusted glasses, but it is usually just a very little facet in an entire personality problem, and I think that is one of the biggest problems we face today in specialization of medicine, is a grasp of the entire patient and not just their glasses or not just their stomach or not just this or that. But medicine in the last three or four years particularly —our journals are coming out more and more with this realization that many of these things we used to thing were important are part of a total personality, a so-called nervous patient, and certainly in an institution like this, one of our greatest problems is to look at the patient as a whole and not as a bunch of little factors, and my own opinion is that the so-called nervousness with glasses is, to me, a very important tip-off that there is a lot more to this than glasses, we had better look into this patient a lot further and find maybe thyroid and other diseases to which was the tip-off, that they just responded by being nervous with their glasses because most people tolerate—you wear glasses and I don't know what your reaction is, but all you have to do is walk down the street—some are bent, have grease all

over them, it never bothers them. The average person is usually phlegmatic to the dirt, and so forth. Whenever [fol. 750] you get a nervous patient, worry about them.

Q. These tip offs you speak of, are they often found by examination of the eyes and eye grounds?

A. No, you never find them there. You find it by carefully quizzing the patient, with reference to their other medical illnesses, that is where you find it.

Q. Isn't it so that you sometimes detect early stages of hardening of the arteries by looking at the eyes, examining the eyes?

A. Well, again, that is a matter of opinion. In my opinion you don't detect the early stages, definitely. The most important thing that is brought out in medical literature is that what you see in the blood vessels of the eye is not reflected elsewhere in the body. There is only one place in the body that there is a reasonably good correlation, that is the kidney; no correlation at all between the blood vessels of the eye and of the brain. They can have marked hardening of the eye, fairly normal brain vessels. That is proven by autopsy.

Q. Am I wrong then in the understanding that certain circulatory disorders in the early stages are better discovered through an examination of the eye grounds?

A. Certain circulatory; now, you may have a specific one in mind that I can't think of right offhand. As a general rule, no. When you get the changes in the eye, the most [fol. 751] striking example is high blood pressure. If you make the diagnosis when they have the changes in the eye, the one thing you can be sure of, the patient is not in an early phase of it, it is a severe hypertension, and he is in the late phases, and it is unfortunate he wasn't picked up before that. As a rule, if it becomes apparent in the eye there is quite extensive bodily involvement. Now, sometimes they are picked up by the eye because they haven't had a routine physical check-up, but it usually is a manifestation of a well advanced disease when it shows up in the eye.

Q. Well, then I am wrong when I have been told that you pick up a lot of bodily difficulties which show up for the first time in the eye?

A. Now, there are two ways to look at it. You won't pick them up in the eye if the person has been reasonably careful in their physical examinations. It is just like a person comes in with a diabetic retinopathy; you make a diagnosis of diabetis; you question the patient; he hasn't been to a doctor in 25 years. Diabetic changes don't occur in the eye for 15 to 20 years, so if you take a hundred people you may find some you pick up, but if you go back carefully it is usually because of inadequate previous physical examination.

Q. But if they are examined by an eye doctor chances are they may discover some of the disorders and can send them [fol. 752] to the proper doctor for treatment?

A. It is very unusual in this general area, including our clinic patients, that we ever pick up a diabetic that does not know they have diabetes. They are aware of their disease, and it is quite unusual. In fact, Monday night we had a discussion at our Journal club about that, and we asked the men how many they had picked up that had diabetes that didn't know they had it. There were only four people seen in the last year not aware of it. Although we do occasionally see them, most of them have had the general condition recognized before you see it. That doesn't mean you shouldn't look at the eye, by the way.

Q. I didn't think you would testify to that, Doctor. I am, naturally, not a doctor and I have to base my thoughts on what opthalmologists tell me. I am not basically familiar with these things, but I am told that a frequent eye examination is good as a means of detecting other bodily ills that may show up in the eyes.

A. Well, now, if you go back you will recall that I said that after the age of 55, from the age of 45 on that rarely should they go more than four years. It is only after that that you get into most of the diseases you think of. In general, you rarely run into these diseases, they are diseases of the over-age. They are protected between the ages of 43 and 45 because their glasses change and they have trouble reading. The one patient you worry about the most is [fol. 753] after he is 55 or 60, when they get along all right reading they won't come in so you can check them. They should be checked every two or three years after the age of 55.

Q. Of course opticians are not trained or qualified to make examinations of the eyes or diagnose conditions from the examination of the eyes?

A. In this area I know of no optician that ever looks in a patient's eye. They are not trained for that.

Q. Well, my question was are they trained or qualified and not whether they ever do.

A. Are they what?

(Question read.)

A. They are not trained for studying eye diseases.

Q. Thank you, Doctor. You have testified that ill-fitting glasses do not create any organic damage to the eye. In your opinion will ill-fitting glasses result in a loss of efficiency on the part of the patient?

A. Well, that expression of efficiency is, again, to me, a very hard question. Efficiency has a lot more to it than glasses, or anything else. One of the greatest things, I think, is a will or desire to do something. It probably is true that some people are less efficient, but I feel quite strongly that we are tending to overdo this matter of efficiency in reference to eye functions, and particularly a lot of the new testing devices coming into industry, because it [fol. 754] is a rather abstract thing that you are working with, and this whole matter of efficiency and what makes a person efficient and not efficient. I think in some cases it would be true it would reduce the efficiency, but I think in the majority of cases if you would study the whole patient, there are a lot of things more important than glasses.

Q. Glasses would contribute?

A. And these other things are probably considerably more important in most cases.

Q. Doctor, I know you are not familiar with this law, but I would like to get your professional personal opinion as an expert in the field of visual care as to whether or not certain of these provisions are salutary and beneficial to the public health and welfare. First, I believe you have testified in your opinion the only legally qualified or competent persons to make eye examinations are ophthalmologists or physicians and optometrists?

A. Well, I think that might require a little—wait a minute. You said legally qualified, didn't you?

Q. Yes.

A. That cuts out what I was going to say. An optometrist can fit the glasses, and so forth, but as to the other aspect of it I think—legally, if you are talking about who can legally do it, I think probably optometrists and ophthalmologists are the only ones that can do it, according to [fol. 755] the law.

Q. Is that the law of Kansas?

A. As far as I know, Kansas and Missouri both.

Q. Are chiropodists qualified to make an eye examination, for example?

A. Are they qualified or can they legally do it? Definitely they are not qualified.

Q. That is all I want to know, whether they are qualified. Do you agree with a provision of this law that provides that no unqualified person should visually correct for compensation the eyes of another?

A. It depends on what you mean by visually correct. If you mean by visually correct the fitting of the frame to the face, I don't think it requires ophthalmology training. That is, as far as I am concerned, total eye care is that and that particular phase of it can be done by a craftsman, technician, whatever you want to call it, and it is all part of your eye care, eye problem.

Q. If that means to make an examination and write a prescription, do you agree that that provision of the law is good for the public when it provides that a person other than an ophthalmologist or a physician or an optometrist, or that no unqualified person should be permitted?

A. To what?

Q. To make an eye examination and write a prescription.

A. Yes, I agree with that particular part of it, to make the [fol. 756] examination and write the prescription, I would agree to that.

Q. You appreciate that some of this language I use, Doctor, is sort of legal because it comes from the law, and if you are not clear on it, if you will invite definitions I will give you the interpretations I think——

A. It is just like getting into a medical aspect, you are at the same disadvantage. That is why I am asking the questions, because I am trying to get an interpretation.

Q. Doctor, the practice of ophthalmology is a profession, I take it?

A. Yes.

Q. And you practice it professionally of course, as a medical doctor?

A. As a medical doctor, that is right.

Q. Do you feel that when a patient comes to your office with defective vision that the usual professional and confidential relationship is established between you and the patient?

A. When a patient comes in? Oh, yes.

Q. The same as a client comes to my office, that relationship is established, you feel that it is professional and confidential?

A. That is right, with reference to the examination, sure.

Q. Do you feel as a professional man that you more or less take charge of the ills of the eyes of your patient and [fol. 757] undertake to remedy any defects that you find?

A. Do I undertake—I would like to get that again.

(Question read.)

A. Yes, that I assume as my responsibility.

Q. You feel a professional responsibility to your patient, of course?

A. Oh, yes, particularly with reference to eye disease.

Q. Doctor, this law has a provision in it that an optical supplier on a written prescription from either an ophthalmologist or a physician or an optometrist may interpret the same and measure, fit, adapt, adjust and dispense glasses, with the provision, however, that the professional man concerned, whether he be ophthalmologist or optometrist, shall remain responsible for the full effect of any appliances which may be furnished the patient. In your opinion, do you feel that that is a good provision of the law for the protection of the public?

A. The question is the one writing the prescription, that they are responsible to see they get what is ordered and that it fits properly?

Mr. Brown: We object to the question as an improper attempt to quote the law. You may go ahead and answer.

(Question read.)

A. In my opinion, any person that examines the patient and writes the prescription, it is his obligation, law or [fol. 758] no law, that the patient be his responsibility, and if the patient is dissatisfied, that it is his responsibility to take care of the patient and to make sure what is wrong.

Q. I am sure you recognize that it is a professional responsibility. Doctor, this law has a provision in it that it is unlawful for ophthalmologists or optometrists to receive rebates from opticians. Do you find any objection to that provision of the law, in the interest of the public health and welfare?

A. You won't find any objection from me, and if you will look in the records you will find out our office doesn't take them. I feel very strongly about the whole matter.

Q. You feel that this provision in the law is good, then, for the public?

A. Yes, sure.

Q. The law further provides that no ophthalmologist or optometrist shall permit an optician to solicit business for them. Do you find any objection to that law?

A. Yes, I would object to that. I think that they are perfectly legitimate retail business and that just in the whole basis of free enterprise they should be allowed to use modest advertising, but not false and misleading advertising. That is the only way they can solicit that I know of.

Q. Well, I am not talking about soliciting business for themselves, I am talking about soliciting business for [fol. 759] a professional man?

A. For a professional man?

Q. Yes. I don't think you understood my question, Doctor. An ophthalmologist, of course, is a professional man. Do you agree that professional men do not ethically or should not ethically solicit business?

A. I don't think ophthalmologists should.

Q. Just like lawyers shouldn't?

A. Yes. They shouldn't advertise, or anything like that.

Q. And surgeons shouldn't?

A. That is right.

Q. Then do you find any objection in this law when it just simply provides that opticians should not be permitted to solicit business for ophthalmologists and optometrists?

A. I do, because I think it is a retail business. I think it has nothing to do with professional groups.

Q. Now, are you talking about the professional service?

A. I don't think—in the first place, I don't think, as far as I am concerned, in the strictest sense of the word, that you can consider an optician a professional man. He is in a retail business, and he is a craftsman like a watchmaker or anybody else.

Q. If this provision has no relation to the optician's business——

A. (Interrupting) Well, a retailer of glasses then, I will put it that way.

Q. (Continuing)—but rather is intended to make it un- [fol. 760] lawful for an optician or any other person, for that matter, to actively solicit professional business for a professional man.

A. You have got me confused, because I don't see where the optician is in the picture. I don't consider him a professional man, to start with.

Q. I think if we could discuss it without question and answer form—I think the basic premise, Doctor, that you need to understand is, and I believe you will concur in it, is that professional people do not solicit business, and if they do so, in most professions, if not all professions, it is considered unethical, and in most instances is grounds for revocation of their license, the purpose being that they should give professional attention to the business of their clients and not be engaged in solicitation of business, commercial applications to their client's business. Do you agree that professional men should not solicit their patients, or clients?

A. As I interpret what you are saying, I agree that a doctor and a lawyer should not advertise in any manner at all and to me law and medicine are two examples of professional men. Now, I can't quite tie this into the dispensing aspect of glasses, because that, to me, is not a professional service. In other words, that, to me, is in a retail [fol. 761] aspect of the thing and I can't quite tie these two together is where I am confused on this thing.

Q. You have heard of ambulance chasers, haven't you?

A. Oh, sure.

Q. You know what they do commonly?

A. Not in detail.

Q. They go out and get business for lawyers. In other words, the ambulance chaser seeks the patient out and sends him to the lawyer, rather than letting the patient pick a lawyer of his own choice. That is called, I believe, solicitation of business. Now, do you agree that professional men should not permit people to solicit business for them?

A. I don't think when you come to the matter of a retailer advertising, he is soliciting business for anybody particularly except for himself, that he wants to sell his merchandise. I can't personally tie up this one aspect which as I interpret it, is retailing glasses, as having anything to do with the professional services involved in it. He is just saying if you have this thing, I am available for this service, to fill your prescription. I don't see that it is soliciting business in any manner or means. Personally, I don't approve of a set-up, for example, of a dispensing optician selecting two or three doctors and sending them to those doctors. I don't approve of that set-up. Most of them in this area, the reputable ones, as far as I know, don't; they [fol. 762] give a list of the entire group.

Q. You are getting right to the point now. Don't you agree that these doctors should not permit or allow these opticians to solicit business for them?

A. Well, I think that if a person comes in to a strange city that it would be perfectly acceptable for them to give a list of all the recognized people, not pointing out anybody.

Q. Sure, but there I don't think we understand what we mean by actively soliciting business and actually referring people to doctors. Of course you understand doctors——

A. (Interrupting) I haven't run into it because I haven't had anybody do it like that. I am unaware that the thing even exists. I am sure in some areas it does.

Q. We all recognize that professional people who don't solicit business depend upon satisfied patients, clients, and friends referring business to them. In my opinion, this provision is certainly not aimed at that type of activity, but rather it is aimed at just what you testified about, wherein——

A. (Interrupting) I don't know how the law reads——

Q. (Continuing)—wherein a professional man may per-

mit or allow an optician to solicit business for him. My question to you is whether or not you think that is right or wrong, whether you think it is proper or not.

A. I will start with I don't think you can give a flat [fol. 763] answer because I think you are asking two questions in one. One of them, I think they should be completely free in their advertising as long as they are honest, and so forth. I personally don't approve of them selecting a single individual or a limited number, but I think it should be possible for them to supply the list of people in the area that are capable of supplying the medical care, but not advertising in the paper.

Q. All right, sir. Thank you, Doctor. Let's take a case —say I don't wear glasses, and I find my vision to be giving me some trouble, I probably need an eye examination, may be in need of glasses. Do you think I ought to go to an ophthalomologist or a physician or an optometrist, or do you think I should go to an optician?

A. Well, to start with, to my knowledge, we have already ruled out one of them, I don't think one of them can do it, the optician. He certainly isn't trained in the examination. As far as your optometrist—ophthalmologist situation is concerned, I think everybody is completely aware it is a confused issue, there are all kinds of opinions on it, and with properly trained ones in either situation, that you can get adequate care provided the standards are high enough.

Q. I termed them as a group, and I don't intend to break that group down, but my point is I have defective vision, and I need an examination for glasses. Should I go to a [fol. 764] professional man or should I go to an optician?

A. Why, you can't go to an optician for examination; at least none of the reputable ones I have ever heard of would even give you one.

Q. Who should I go to?

A. Go to an ophthalmologist or an optometrist. That is your choice as an individual.

Q. Doctor, do you feel that an ophthalmologist should make eye examinations as an employee of a lay person or a lay group, but should he make them personally, professionally, confidentially?

A. Well, I think that you are bringing in two problems; one of them is basically a matter of ethics, interpretation of ethics. As far as their ability to do it, I think they can do it either way. As far as ethics are concerned my feeling is that they shouldn't. However, the trends of the country show—I mean the groups that are employing doctors, for example, Kansas City Garment Workers, in their home medical care program, that entails a lay group hiring ethical doctors. So that is why I don't think you can give a flat answer to the proposition. Medically, they can certainly do it under any circumstances, and they can remain confidential, they can do the whole thing. I just personally wouldn't do it, and I would not encourage my residents to [fol. 765] do so, but I think they are competent to examine under that set-up.

Q. I see your point about the Garment Workers. But isn't it so that in that case the doctor is responding to a request for professional services, for which he is paid, and that he does give those people professional services?

A. He is strictly under hire, that is all he is, hired by them at so much per month.

Q. Full time?

A. I can't say full time. I know there are places, Kaiser's set-up, for example, is full time.

Q. In that case the doctor doesn't offer his services then to the general public, where he is engaged full time to deliver his professional services to an individual?

A. We have many examples of that. How about the Mayo Clinic? Nothing but a lay organization, all full time men rendering professional service.

Q. I am exempting from my question, or will now, hospitals and things of that kind.

A. I mean the same thing applies. A man can give excellent care, a man can perform very capable services, but I think it is a matter that is being thoroughly discussed in medical circles as to whether it is ethical or not.

Q. Let me give you another example. Do you think that an ophthalmologist should hire himself out to an optician [fol. 766] on either a salary or a commission, and make eye examinations for that optician?

A. Again you get back to the same basic problem. I think

a completely competent man can do it. Personally, ethicwise, I don't approve of it.

Q. Why don't you approve of it?

A. Why don't I approve of it? Well, one of the things that I don't like about it is I still am a great believer that it is a free enterprise proposition. I don't like to see people subjugating themselves to somebody else. But I don't think it has anything to do with what a man can do. He can perform just as good services under that set-up. It just goes against my idea of how things should run, and I can't be the one to say whether it is right or wrong.

Q. Do you see any danger of a commercial or selling influence over-riding the professional approach and attitude that a professional man should take to his patient? Do you consider that a danger?

A. I don't think the danger is any greater than it is to a person who sits in his office by himself, because it all goes back to one thing, the individual, and a man can open an office by himself, and we all know in your profession and in my profession that you can be completely unethical, it has nothing to do with your surroundings.

Q. Doctor, you are a highly professional man and a highly ethical man, I am satisfied of that. But in your opinion [fol. 767] might some other practitioners, if they are permitted to hire themselves out to commercial interests, be prone to not give proper professional care to someone that comes in for an eye examination and be influenced by the commercial attitude and desires of his employer?

A. I don't think that is necessarily so at all.

Q. You don't think that there are any people that would do that?

A. No, and I think that you can picture right offhand an individual who might do that, a very qualified person who has a physical defect that limits his ability to work, where he doesn't want to have to worry with the operation of an office, and so forth, and go out on a strict salary, do excellent work where he knows he will have to work particular hours, he doesn't have the obligation of financial overhead, and so forth. I can see where a very good person in poor health might accept such a situation. I wouldn't do it personally; and I don't think it would interfere one bit,

and he could still be the most—an excellent practitioner. I am not saying they would necessarily be that, but I certainly don't think it rules out that possibility by a long shot.

Q. It doesn't rule it out completely, but it doesn't guarantee that commercial influence might not be exercised over that man's professional service?

[fol. 768] A. You sure don't have that guarantee in any other set-up, either. You aren't guaranteed, in your profession or mine, going to a person in a private office, that he won't be attracted by the same commercial thing. You see, that is the whole thing, you can't guarantee yourself in either situation. It goes right back to the individual; the individual and his moral principles is what you go back to.

Mr. Brown: Do you have patients waiting for you, Doctor?

A. Since nine o'clock.

Mr. Daugherty: I believe if you have patients waiting, Doctor, that I will conclude my examination. Thank you very much.

Mr. Brown: Did you have anything else, if he didn't have patients waiting?

Mr. Daugherty: Possibly so.

The Witness: It can be taken care of, if you have any pertinent questions.

Dr. Daugherty: We will stop our examination.

Mr. Phillips: The doctor says he will make arrangements if you desire to ask any more questions.

Redirect examination

By Mr. Phillips:

Q. You say that on the back of your prescription you write the name of an optician after you have given the [fol. 769] names of several reputable opticians to your patient?

A. Well, I usually do. Sometimes I give a patient the pencil and they write the address down themselves. I give them the choice and then they usually say, "Well, I can't remember it," so either I will jot it down or sometimes they have the pencil in their hand and jot it down themselves.

Q. Is that for the convenience of the patient in remembering the address?

A. So they won't have to look it up in a telephone directory, or forget the name.

Q. You don't consider that a direction to a patient to go to that one?

A. No, I don't care about it. That is why I refuse to use printed prescriptions. It is just for their convenience.

(Discussion off the record.)

Mr. Phillips: Doctor, you have the right under the law to read and sign your deposition, or you may waive it and have it submitted by the court reporter simply as she transcribes it. What do you want to do?

The Witness: I am going to be out of town so quick——

Mr. Brown: Will you waive your signature then?

The Witness: I have to leave town to go to Atlanta, Friday.

Mr. Brown: Is that satisfactory with you?

[fol. 770] Mr. Daugherty: It is simply up to the witness, as I understand.

Mr. Brown: Then you will waive your signature under the circumstances?

The Witness: I see no alternative.

Mr. Brown: The attorneys will also waive it. You are not going to insist?

Mr. Daugherty: I am going to do whatever the doctor says.

The Witness: I would like to read it, but I don't see any possibility of doing it, because I am going to be leaving. I will be out of town until a week from Monday. There is no possibility of checking it, whether I want to or not.

(Witness excused.)

By agreement of counsel and the witness, signature of witness to said deposition was expressly waived.

Beryl L. Finley, Notary Public within and for Jackson County, Missouri.

[Seal.]

Notarial Certificate to Deposition (omitted in printing).

[fol. 776] In The United States District Court

[Title omitted]

Deposition—October 14, 1953

[fol. 777] Mr. Phillips: This witness has specifically requested that we insert in the record the statement that he is not appearing for or on behalf of or is in any way associated with the parties to the present lawsuit, and that his appearance is solely as a disinterested expert to testify under subpoena on problems concerning which he is questioned.

Dr. Sheard: That is right.

Mr. Phillips: Is that correct, Doctor?

Dr. Sheard: That is correct. That is what I asked.

Dr. Charles Sheard, called as a witness on behalf of the plaintiffs, having been first duly sworn on oath, deposeth and saith as follows:

Direct examination

By Mr. Phillips:

Q. Will you state your name?

A. Charles Sheard.

Q. Will you state your profession or occupation at this time?

A. At the present time, is that what you want?

Q. Yes, sir, if you will.

A. I will give you the present title that I hold as Director

[fol. 778] Emeritus of the Division of Biophysics of the Mayo Clinic, and Professor Emeritus under the Mayo Foundation at the University of Minnesota. I am inactive, but I am still a member of both.

Q. All right.

A. If you want to know furthermore what I have done and do——

Q. I do, sir.

A. For the last five years I have gone south to New Orleans, I will be going again this year, about the first of December, and will be there in the Department of Ophthalmology of the Graduate School of Medicine of Tulane University. This will be either the fifth or sixth year. I am not sure.

I still in a way am interim dean of the Los Angeles College of Optometry, and then when the dean was secured during the course of the school year, I was no longer dean, but I am still concerned with them.

This fall I am teaching a course in opticianry in the Rochester Junior College of Rochester, Minnesota. I say that for this reason, that this year and in several other years I have taught in various colleges and gave instructions in the [fol. 779] three fields of ophthalmology, optometry and opticianry.

Q. Will you state the degrees you hold, Doctor?

A. Yes. I will pass by the A.B. and the M.A. degrees, and come to the Ph. D. degree, the Doctor of Science degree, and the last degree I got was from none other than Los Angeles College of Optometry, as an Honorary Doctor of Ocular Science.

Q. How long were you with the Mayo Institute, Doctor?

A. I have been five years emeritus. Counting that, almost exactly thirty years.

Q. Are you a member of any professional societies or organizations?

A. Yes, of a very large number. You will find some of them listed and you have got to get Who's Who now to find out all of them, but as far as vision is concerned——

Q. Yes, sir.

A. Well, to go abroad, I am a fellow of the Optical Society of Great Britain, a feilow of the Ophthalmic Institute in England.

And coming to this country, I am a fellow, honorary fellow, since I am not a practitioner of medicine—I have the basic science training, but I have never practiced medicine [fol. 780]—that is why I had better emphasize the fact that I am an *honorary* fellow of the American Academy of Ophthalmology that is meeting here.

I am a fellow of the Research Society of Ophthalmology. I am a fellow of the Optical Society of America. That is the great big overall opticall society. Well, I am a fellow of the American Academy of Optometry. I am a life member of the American Optometric Association.

I have been president of the American Board of Opticianry. That isn't a society quite, but it is a Board of Opticianry, and I am now acting as the secretary of the board, because of my interest in education strictly.

Q. I see. Have you written any texts or papers in the field of visual care, Doctor?

A. A considerable number.

Q. Would you name some, sir?

A. Well yes. As books, I contributed the section on physiological optics to the American Encyclopedia of Ophthalmology, about six hundred pages. That was about 1920. Another section, and reprints—I have all of these as separate reprints—on radiant energy and transmission by ophthalmic glasses. Another on problems of accommoda- [fol. 781] tion and convergence. The first little book was entitled Dynamic Ocular Tests, 1914. Scores and scores, I don't know how many, of smaller articles.

Q. That is all right, sir.

A. But I think there is one thing I should mention in connection with medical physics. I contributed the section on ophthalmic optics as a shorthand statement or condensed statement of all the things that are concerned with these things (indicating.)

Q. You are pointing to your eyes?

A. Well——

Q. You are pointing to your eyes when you say "these things"?

A. Glasses.

Q. Glasses. I see.

A. Physiological optics. In ophthalmology and optometry

I wrote many articles. You will find them in the journals. The one I emphasized was the fact that I had written a text that had to do with all of these appliances, all the physical laws of optics and so forth.

Q. Are any of your writings used as texts in the modern [fol. 782] schools of ophthalmology, optometry or opticianry?

A. I am going to laugh now, and then to say that they all went out of print, so they couldn't be used.

Q. I see.

A. But this year, in my seventieth year, ophthalmologists and the optometrists and the opticians, as a united effort—many have mentioned it to me here in this hotel—have sponsored the publication of a Sheard commemorative volume to include those writings which are no longer available, so that they may be made available to the students. They are quoted, found in the libraries, and the students have to find them there, because they are out of print, most of them.

Q. Doctor, you mentioned that you are secretary of the Board of Opticianry?

A. At the present time.

Q. At the present time. Do you hold any other official positions in any of these societies of which you speak, as an officer or a member of a committee? Let me add to that question, or as a consultant to committees.

A. Well, as an instructor in the Academy of Ophthalmology; and I was an instructor in the courses for a great [fol. 783] many years, but I finally got the gold key, and that was supposed to be—you know what I mean by that; and so we took our place in the honored ranks of those who had served.

Q. Specifically Doctor, are you a member or a consultant to the Committee on Interprofessional Relations?

A. Yes. I organized the first, what I called Interprofessional Relations Committee in Optometry, and was appointed the first chairman, as I remember, in the City of Toronto, at the National A.O.A. Convention, oh, it might be fifteen years ago, I am not sure, and nursed it along and carried it along, hoping to get these men together; with some little success.

Then it was revived. After the 1935 resolution in the A.M.A.—it was known amongst us as the 1935 resolution —was rescinded, which would prevent medical men from in anywise giving instruction or in anywise associating with laymen—since optometrists are laymen, medically speaking, and they are, strictly speaking, to the medical men. Everybody that is not in medicine is a layman. After that was rescinded then the whole movement could be [fol. 784] revived, and it was revived, starting with the Committee on Optics and Visual Physiology of the Ophthalmological Group Society, and then the optometrists and opticians came in and they started the movement over again.

Q. And from the movement of which you speak came the present Committee on Inter-professional Relations?

A. That is right. So presumably the older ones of us had had our experiences, and it was thought wise to keep out of active relations and let somebody else see what they could do, which was a good thesis, but we would always be more or less consultants.

Q. Doctor, from your experience as a member of these inter-professional groups of which you speak, and from your activities in the various associations which you have mentioned, are you familiar with the history of the growth and progress of the profession of optometry?

A. Yes, sir.

Q. Are you familiar with the history and growth of the profession of opticianry?

A. Yes, sir.

Q. Will you trace the history of the growth of optometry [fol. 785] and opticianry to your knowledge?

A. You might have asked me of ophthalmology also.

Q. Yes?

A. And I would have said yes, sir.

Q. Then I will add ophthalmology.

A. Yes, sir. Well, take them in the order you gave them. Optometry. In 1914 there was established in the Ohio State University, perhaps because of my own interests and agitation, a course in visual or applied optics, since there was no law in optometry in the State of Ohio then, that later, as I passed out and went elsewhere, developed into the School of Optometry.

I advocated and was professor in a course of four years duration that gave a college degree in optometry. It was the first course in the world, and I am sure that it is true, that had any such four-year course and gave any collegiate degree in optometry.

It was their professional birth, because prior to that there had been nothing but private schools, six weeks courses, as long as the fellow had some money—maybe you don't want this testimony—but that was a good deal of what it [fol. 786] was.

Q. Doctor, you put into the testimony the factors which you think are of importance.

A. Yes.

Q. In tracing this history and growth.

A. Well it would be a little derogatory, but it was a proprietary school situation; and I have seen optometry grow, I have seen some schools deleted, the same as in medicine, because I could repeat this for medicine.

And I have seen them come into Columbia. Columbia was the first one that had a course of any kind, but that was in the extension department. Well, that didn't have any good standing. This was the first one that had university recognition.

Then in California, the University of California, I have seen that come in, and I have seen these other schools grow and get better and better, longer years of training, that is, the earlier one was two years at the best institution, now five years, and then the proposal of six years.

So I have seen it advance all in one man's lifetime, in probably fifty years. Of course the first law was in 1900 in optometry in Minnesota, so you see it had to develop [fol. 787] in fifty years. There has been a gradual good development.

Now in opticianry there were no courses at all, so I argued if you have got to have the boards of ophthalmology—and there were no such boards when we started these courses in optometry at the university, so that was all born since 1910. I think it might have started then.

I started with many of those men in the early days of instruction. But never mind that, a few, a handful of men that started this very thing that is beneath us in this build-

ing, and I have seen it grow until it got to be a standard three-year course, beyond that of medicine; so in the winter I teach in that kind of a course.

Opticianry had nothing. So the logic was this, how can you have this advancement, on the professional side, and have absolutely no skill down below with trifocals, with contacts, with plastics, with aniseikonia, and all the modern forms of ophthalmic lenses. Aniseikonia is where the image sizes are different, is what it means. The Dartmouth development, and so on, and all of that, and the greater skill [fol. 788] developed here, and these things (indicating) then coming to take care of these conditions, a most intractable condition if it didn't have some basic training in opticianry.

So in 1946, in September, 1946, we established a two-year course in opticianry in the Rochester Junior College. And that was the reason for it.

Q. When the first schools in optometry developed of which you speak, had the profession of optometry as such distinguished itself from its antecedents—strike that out.

A. I think I know what you mean.

Q. Let me ask the question. When the first schools of optometry were developed had that profession at that time segregated itself from any former profession?

A. No. They came out of pretty much the jewelers' stores. That was jewelers and opticians. So in the last analysis every one of them went back, ophthalmology and optometry all go back to the optician. It is the most ancient of the lot.

Q. I see.

A. It goes back even to the fellow who is supposed to have invented spectacles, Salvini d'Armato, he was an Italian, about the thirteenth century, goes way back to that, so that is the antecedent of it.

[fol. 789] Q. Yes, sir. When the optometrist first segregated himself as a profession did he at that time maintain an interest in the dispensing of eye glasses?

A. The correct term in the early years was optometrist and optician.

Q. I see.

A. And the statement on the part of the medical profes-

sion was that he was an optician selling glasses, and that he had no background or training in order to prescribe; and he in turn said that neither did the medical man have any adequate training; and they both told the truth, and they both lied.

Q. Did the optometrist initiate efforts at that time or subsequently to establish their position as a separate independent profession?

A. Yes, yes.

Q. Are you familiar with the developments?

A. Yes, I think I am.

Q. Will you trace those developments, sir?

A. I will try to. You might put this in parenthesis, I am not sure of my dates, but I think that—what I know is that the first law in optometry was in 1900, I know that the [fol. 790] American Optometric Association was formed prior to that, was composed of a group of optometrists—well, of optometrists and opticians.

Well the word optometrist I don't believe existed at that time, but they were called opticians. I know that is true. It is said that a man John Eberhardt of Dayton, Ohio, coined the word. I knew Eberhardt very well. I think he probably did. So it is a word that is an instrument—well an optometer is a measure—a meter is a measure, and op is eye, so optometer is an eye measure, therefore optometry, which is measuring the eyes; so it is logical.

That group started I think about seventy or seventy-five years ago, I may be wrong in my number of years, but the first law was in 1900 which gave them the right to practice legally, that is, it gave them some status.

It was fought by the medical profession, as were most of those early laws fought by them, on the basis that they had no medical training, and that eyes are part of the body, so therefore they should come only under the care of a physician. And, of course their statement is still true that the eyes are part of the human body, and it was a ques-[fol. 791] tion of recognition of diseases.

And that was fought up and down the line, so that some adequate training had to be put in the courses, not to treat nor diagnose disease nor operate, but to gain exact knowledge whereby this practitioner upon the public might be

a fairly safe practitioner from his ability to be able to refer the thing which was abnormal, to the man who might in the medical field take care of it either by improving it or say that it could not be improved; it was out of his sphere. So that it has grown in that manner.

Q. In the course of this growth, Doctor, did the profession of optometry have problems in the development of its professional ethics?

A. Oh yes, many of them.

Q. Will you describe some of those problems, sir?

A. Well they are still with you, some of them. I think probably the two greatest problems, one, of education, formal education, and going into college, those were very definite problems, and what should be included in the course.

Those were problems, but there were the practical problems of whether they should be on the ground floor or up [fol. 792] in an office. If they were going to be professional men, the idea was they should get off the ground floor.

The other problem was that of advertising.

So I said you have still got it with you, although little by little men have tried to come more and more into the professional range of operation, at least on paper, and somewhat more in practice, so the percentage of strictly professional men increases, and those whom we might designate as those who are concerned chiefly with merchandising, less and less; and less and less advertising.

Of course a good deal of the removal of the "Dr. Jones, Optometrist, Eyes Examined Free," which were on the windows and in the signs, and you called him up and "No, we don't charge anything for examination. If you get new glasses, why that is what you pay for."

So it was obviously in many respects a commercial transaction, or at least anybody might feel so.

If you were an honest man it didn't follow that that was true, but it was the outward semblance of it; so that the [fol. 793] two great problems professionally still exist. They exist in medicine. They exist everywhere.

Q. I see.

A. Of the actual professional service, with the deletion of or the minimization of emphasis upon the material thing, and the advertising taboo.

Q. Are the leaders of the profession of optometry today attempting further to eliminate commercialistic factors?

A. Very definitely. Oh yes. There is no question about that. Oh yes.

Q. But they have not been successful completely in eliminating it?

A. To the end of time no profession will ever be successful completely, because you will always have some shysters.

Q. State whether or not to your knowledge it is the prevailing practice of optometrists to this day to dispense eye glasses in the course of their practice.

A. Yes. The case in optometry, it is an all-inclusive service. That is the expression used. It is a good expression. It means visual care.

[fol. 794] Optometry, after all is said and done, is presumed to be the art and science of visual care, and a part of that care should be the competence to refer to the physician. Part of that care should be the problems of clear vision and comfortable vision. Part of that care, as he sees it, is that he should cause those things which will enable this comfort and this clear vision to take place, so he gives an all-inclusive service in which he is pretty much his own dispenser.

Little by little there is beginning to be a departure from this, in which the emphasis is placed more and more, and the colleges are laying more and more emphasis upon a separation of, at least a very definite separation in everybody's mind, that this is a strictly professional act, and here you are, and this is the prescription; that these then are separate and entirely different (indicating.)

Q. You were pointing to your eye glasses?

A. Yes. Entirely separate; so that this is the professional act, just the same as the doctor writes a prescription and the pharmacist fills it; and so it is becoming more and more a case where he would be more of a professional [fol. 795] man and a little bit less perhaps of a dispenser, just as a doctor became less and less of a dispenser of his own medicines.

Q. Now is that, sir, the view which the leaders of optometry are urging at this stage?

A. Yes, indeed. I talked with Dr. Jim Wahl—if you

want this in your record—who is president, and that was mentioned last night. We are all working toward a development of better professional practice and better service to the public through education.

Q. I see.

A. And the deletion of the commercial element.

Q. Right. Now, sir, during the period of development of the optometrist, what if you know was the development of the optician?

A. Yes. Educationally he was zero, scholastically speaking. It was an apprenticeship system. The big companies had the research men, and they developed, Zeiss, for instance, and Von Rohr, and men under Zeiss, the American Optical Company and Bausch & Lomb and Shuron and the others, big and little, they did so much of the surfacing and finishing of at least one side of the lenses.

[fol. 796] So that they had the brains that were presumed to be essential, and this man then bought his lenses, and then he drilled, he edged them and he assembled them, then he mounted them in the frames.

That was all the knowledge that was had, except he had a lot of tables, so that he referred to this table and he got this, and somebody, the boss or foreman told him put that lap on there, so that was the way it was, with no knowledge at all of what was inherent in the making of such.

It was an apprenticeship system with the brains up above, which the lack of brains down below couldn't have done.

Q. I see. And what development has taken place in that system?

A. Oh, as I said earlier in the afternoon, the optometrist and the ophthalmologist and the educators and many sane thinking people saw that it was essential that these men who were finishing the lenses as prescription opticians in the laboratory, wholesalers you will call them, and the dispensing men, needed to know a great deal more about what went into them, some knowledge of what the conditions were, so that they might talk intelligently with the doctors [fol. 797] with reference to the intricacies of the prescription.

They needed to know a great deal more about corrections, about thickness, about effect of decentration, and all of the things that you see constitute ophthalmic optics.

We have got cylinders and spheres and prisms and trifocals and bifocals, so that it becomes then not just a matter of tables; if you have any brains in this work, it becomes a matter of basic knowledge, of which he (the optician) may use none on some occasions, and which he may need all that he has on other occasions, depending a lot on the complexity of the prescription that he gets.

If he were to get simple quarter spheres or half diopter spheres, as we call them, those intricacies wouldn't enter, but if he gets cataract lenses, or if he gets a high powered lenses like mine, and he gets them so they are decentered——

Mr. Harkey: I think this is good. It should go into the record if you don't mind.

The Witness: I don't mind.

Mr. Phillips: Q. All right, go ahead.

A. You come up to the high powered lenses, and mine [fol. 798] are fairly high, about five diopters, and they are not centered, so I will decenter by just tilting (indicating,) and I do that, and he doubles on all these adju tments, the angle, so that you don't put false cylinders in. It is a matter of putting in a cylinder by turning (indicating.) Now I am back (indicating.)

Q. Now, sir, remember that the court reporter isn't getting these motions into the record. If you tip——

A. If I turn the lens like that (indicating) I introduce an element that wasn't there when it was in the right position. A new element was introduced, a cylinder for horizontal astigmatism, so I have warped those pictures back there.

Mr. Harkey: Counsel, I can see from here and you can't, and he inserts that by tilting the bottom of his lens toward his face, was the motion he made, to show how he introduced a cylinder which caused a horizontal astigmatism.

Mr. Phillips: That is correct.

The Witness: And I distorted it, yes.

Mr. Phillips: Q. Now how did you make——

A. Then if I introduce this (indicating,) I introduce what we call a prism.

[fol. 799] Q. I see.

A. Because it is a prism up and down, so I see double, and if it is not well adjusted it is a little bit indistinct and obscure, and I just want to shake my head and try to clear it.

Q. Now——

A. Now the further up it goes in power, the worse these elements are.

Q. How would you correct this tilting which you demonstrated so that the lens is in proper position?

A. All right, if it is done right or as it should be done, the man who writes this prescription, the ophthalmologist, if he wrote it, and the optometrist if he wrote it, should put in his record an order given to the optician, and I said, you remember, if it was a very weak lens, it would be like a penny out of a dollar.

Q. Yes?

A. So you have got to appreciate it goes up, as you see it is the square of the power of the lens.

Q. You are speaking of high powered lenses now?

A. Reasonably high.

Q. Yes?

[fol. 800] A. From two diopters on up.

Q. Yes?

A. Two diopters up, and as it goes up, the more significant the effects.

He then should specify when he made the examination how far his trial lens was from the eye, he should specify at what angle his trial frame had been placed, so that when that was known, if he does it as it should be done—I am not saying; it happens too often it isn't done—the optician then has to be the one that has to judge of all of this by his adjusting, but if it was done, then all of that in the high powered lens would be included.

Q. To correct this obscurity which resulted from your tilting the lens, what would one do?

A. It simply——

Q. Tilt it backward?

A. He would do this (indicating.) He would tilt it this way (indicating,) and then the other way. He would make them nearer straight up and down instead of this way (indicating.)

Q. You are tilting?

Mr. Harkey: He was tilting the cylinder.

The Witness: Now when I am saying——

[fol. 801] Mr. Phillips: Q. You are tilting the lens and adjusting the temples?

A. So we don't mix the two things, as one of the big boys downstairs was doing the other night, the cylinders and prisms.

One is a cylinder, when we roll it this way (indicating,) and we would then adjust until we have distinctness and could read. The other, as to the adjustment, when I was doing this (indicating)——

Q. That is turning the lens sideways?

A. Here is the optical center, we will say, here and here (indicating); But here we are, and that is where I am looking straight through (indicating,) and there is no distortion.

It doesn't make any difference how cheap a lens it is, or expensive, if I am going along what is known as the optical axis, there is no distortion.

One of these gets lower (indicating,) then I put a prism up, and the other gets down, as it would vice versa (indicating.)

Mr. Branton: You are speaking of one lens getting lower [fol. 802] than the other, then you have a prism.

The Witness: Then we have a prism one way in one eye and we have a prism the other way in the other eye; then I see double.

Mr. Phillips: Q. I see.

A. And because my vertical directions won't overcome but a small amount of vertical imbalance, as we call it.

In between that stage of doubleness is that stage of indistinctness and fuzziness. It seems a little hazy.

Q. Yes?

A. So therefore there would be one point, and there it is, it is very definitely right there with me (indicating,) where we are double, and in between there——

Q. Excuse me, Doctor, with your finger you are now moving——

A. I am moving this corner of it further down, and the other one up.

Q. Right, sir.

A. And if my eyes are on the optical centers, or also equally below, then I am in the same territory——

[fol. 803] Mr. Harkey: At this time, counsel, he is tilting his lens in a vertical plane.

The Witness: That is right.

Mr. Phillips: Thank you, sir.

Mr. Harkey: I can see over here and you can't see it from your angle.

The Witness: That is, you can see what I mean, that here are the optical centers (indicating,) and as long as my eyes go down like that (indicating,) there is so much prism in this lens, at this point (indicating,) and there is the same amount here (indicating.) They are both base up. That does not give you the action that I gave you. But it will give you a displacement which has to be learned, how to get along with the resultant partial displacement.

You walk out with a new pair of glasses, and the sidewalk comes up and slaps you in the face, so to speak, as you move. That is because of the fact that they are prisms of equal power in both. Then you have to re-orient yourself, or the public says you have got to get your glasses fitted to you—no; you have got to fit yourself to the glasses, is what they say.

Mr. Phillips: Q. I see. If you were a skilled optician, sir, [fol. 804] what steps would you take to assure that the prisms were in the correct position on the face of the patient?

A. That the lenses were in the correct position.

Q. That the lenses were in the correct position.

A. Well, various methods. First of all you can determine with various instruments that we all have, (and the optician has), where is the optical center, because he can mark the line here (indicating,) where it continues unbroken, he can mark the line here (indicating) where it continues unbroken, and where they intersect will be the optical center.

Mr. Branton: Indicating a vertical line and a horizontal line on each lens.

The Witness: Yes.

Mr. Phillips:

Q. And where they intersect is the optical center?

A. Right. Here we have got a correction. I can't do it with my own glasses. I am visually incapacitated without them. I used a word I shouldn't use; I am not any blinder than I was before, but I just can't see the details, that is all.

The same in here (indicating). I will do it this way, and say I got the lens. Here is a cross. So I look through [fol. 805] until the line horizontal is the same inside and out, so I mark that line. I come up here (indicating) and I mark it through until it continues here. It goes to the left. It goes to the right. Here they cross and that is the optical center.

Q. You are using an instrument now——

A. Right.

Q. —which calibrates your lens?

A. But it doesn't need to be. You see they do have instruments, because you can do it then with accuracy.

Up comes the ink marker, then down here is this line with three dots. You take it the other way, of course, the line.

Q. You do it automatically with that kind of instrument?

A. I can do it automatically with that kind of instrument, but if I need to do it I can do it with a pencil, a grease pencil, and mark where that line is, and mark where it is here (indicating).

Q. Yes?

A. And get a very close approximation to the optical center.

Q. All right, sir. Now you have obtained the optical [fol. 806] center. What else would you do as a skilled optician to assure——

A. You note that on the lens. Then I need to know where —there is a measurement that somebody has got to take— and I said advisedly somebody, because they have got this in the courts, because nobody but an optometrist or oph-

thalmologist could take what is called the P D, big P and big D, or the interpupillary distance from center to center.

Q. Yes?

A. Because then the centres of the eyes, as I look at you, should be on the centers of the lenses.

Q. All right.

A. So somebody, and he is the optician, the one who does it, measures the P D so as to determine where these optical centers shall be placed in this frame.

You can pull them this way (indicating) or this (indicating,) or he has got a bridge that he has got to fit to my nose.

Mr. Harkey: Counsel, now he indicates outward and indicates downward.

Mr. Phillips: Yes, the witness has been indicating outward and indicating downward.

[fol. 807] The Witness: Yes.

Mr. Phillips:

Q. Now, Doctor——

A. I haven't quite finished. So we will go back to what we were talking about.

So understand, he has a series of mechanical and optical and physiological problems to put together. He has to know the P D.

Q. Yes?

A. And that is a measurement that is made.

Q. Will you state how one measures the interpupillary distance?

A. In various ways, with great accuracy by some methods, but the common procedure is the use of a rule, in which you line one edge here (indicating,) and then come here (indicating,) or with a small device that enables light to be used so that you can see where it is on the scale.

You see here is the light (indicating,) and then you read it on the scale, that is, on the instrument or the Zeiss instrument, and which cost you several hundred dollars in the days when they made them, and they are gone, which did it as a telescope would do it, and you got it perfectly.

Or if you wanted to do it you could set up a photographic

[fol. 808] apparatus, and everybody's face was photographed, and his eyes were photographed, and you measured the P D.

Q. With a ruler?

A. With a ruler by the eyes. You could say there are many ways; some elaborate, some simple.

Q. In substance are you saying that the taking of the interpupillary distance is a measurement problem?

A. It is a measurement problem.

Q. Yes, sir.

A. Yes.

Q. These instruments which you described reduce the measurement problem to something definite and something very easy?

A. Something that is easier and more accurate.

Q. Accurate.

A. That is, the easiest one—and with experience, as good—is the simple rule method.

Q. Is that difficult to do, sir?

A. No, it is not, no.

Q. It is important however?

A. It is important, and particularly with a lens beginning to have relatively higher powers, the reason being that [fol. 809] on a very low power lens a millimeter or two isn't going to introduce very much prism, where in a high powered lens it will.

Now I don't think that this should go in. If it does, I will repeat. I will give you the exact way to do it.

Suppose, the average prescription runs lower than two diopters, so I will take the two diopters here, and if I am a millimeter off on the two diopters, and I might be, then the power of the prism introduced would be the power of the lens multiplied by the decentration in centimeters, and it is two tenths of a prism diopter. Two tenths of a prism diopter.

Now this might not make, and would not to my way of thinking, make any difference horizontally, but you begin to get it of significance vertically.

With me I just can overcome vertical prisms of one diopter, or two, about the limit; then you can see it is a question of simple percentage.

If you have got a hundred dollars you can blow one. If you have got ten dollars, it is a little more risky. If you have got one dollar and blow the dollar, you are busted. [fol. 810] It is just a matter of per cent, really, and that is the way to look at it.

Q. Now then you have the correct interpupillary distance.

A. You get those measurements. You then have to get the bridge that will be—don't look at this, because my nose never ought to wear a bridge of this kind, but if I am going to be modern I have to do it. My lenses are always out a little too far, so don't take me as an example of a perfect fit, because it is not, but I will still stay modern.

The nose width has to be fitted, and you can see the nature of the nose I have got, and it takes an expert to fit my nose like a pair of glasses should be fitted to me.

Mr. Harkey: Counsel, could we add that the witness has a firm, resolute nose.

The Witness: As you see, the high bridge, and with eyes that are fairly well receded, as you can see.

Mr. Phillips:

Q. Yes, sir.

A. So I am no easy face to fit. As a matter of fact I never had from the best of them what I would call a perfect fit. [fol. 811] Q. Yes, sir.

A. But to come back to it then, he has got to get that, the right width, and here, what we call the saddle bridge, down like that (indicating,) if you can see with the bridge.

If I had known I was going to show you, I would have brought an old pair along and showed you a perfect fit made by hand.

But we have got to have the bridge and pads and all those things adjusted so that they don't raise too many sore spots on my nose, to say the least, and too much abrasion.

And after he has got that, then he has got 22 or 20, or some number, which he finds, he has then got to put these in such a size as to bring these optical centers right.

Q. In such a size frame?

A. In such a size frame. Then when you go from here (indicating) to the center, or from here (indicating) to the center——

Q. You are pointing to the pads?

A. Yes, across the distance in here (indicating.)

Q. Between the center of the lenses?

A. Between the center, yes. But when he gets all through, then it must be such that they should come from here (in-
[fol. 812] dicating) to the center, or from here (indicating) to the center, and it would be the same.

Mr. Branton: When you say "from here to the center" you mean from the pad on one lens to the center of the other lens, is that correct?

The Witness: This (indicating.)

Mr. Branton: Must be equal.

The Witness: My eyes are equally displaced, but if they are not, then this may—this eye (indicating) may be further from my nose than this eye (indicating,) so therefore that will be an unequal distance.

If he tests it over-all, he gets then an over-all answer, but my nose doesn't have to be in the center of my face necessarily. Therefore this eye (indicating) we will say is further out, so he has to then get this center (indicating) and make this bridge so that this (indicating) is a greater distance than this (indicating,) so it becomes then a combination of all of the details.

Mr. Phillips:

Q. The adjustment of these centers, Doctor, is that a matter of craftsmanship?

A. Or mechanical skill or craftsmanship, yes, to an extent I would say that you know the principles, but it is a
[fol. 813] matter of skill.

Q. That is right.

A. Yes. It would be like a tailor making a suit of clothes. You are not the same dimension here (indicating) that you are here (indicating.)

Q. You are indicating one shoulder (indicating)?

A. From here to here (indicating.) None of us are. One half my face is bigger than the other, I don't know which, but if you photograph it you find we are all handsome because we are not symmetrical.

Q. Now, Doctor, in the instance which you showed in which one of the lenses is tilted, how would the optician

recognize that fact in fitting that frame or that pair of eye glasses to the face? How would he recognize that one of the frames was tilted so that the vision of the doctor's patient had been obscured?

A. In the manner of which we spoke. If he had been trained in the theory of lenses he would then know for instance that if you take one diopter lens and you tilt it fifteen degrees, that he would get one tenth, about one tenth of a diopter cylinder along the axis of rotation, which would [fol. 814] be 180 degrees. That is, you can mathematically figure all those things for any degrees and strengths of lenses you please.

So he would know then that if it was a quarter diopter cylinder it wouldn't make much difference. It is the penny business here probably, but he would still adjust.

But if the lenses were higher, or had cylinders at the oblique axis, or he had more and more complications, he then would need to be concerned about the accuracy of the placement.

Q. I see.

A. And therefore if, as I said to you, if I only knew enough to tell the doctor, or I knew enough to tell the optician exactly what it was that disturbed me, fine, but you see sometimes this has been asked, and nobody knows what the angle was, or how powerful, nothing of the particulars, nothing of how he had used these lenses in the testing, so then the man who has been trained in the theory and the practice, that knows all the possibilities that could enter into this problem, that is his training.

Q. Yes.

[fol. 815] A. Like any diagnosis of anything. What are the symptoms? What are the complaints? They are likely to arise from what sources?

Q. Now, Doctor, in the event that the optician had unwittingly or unintentionally made an error so that the lens, the high powered lens was tilted slightly, would the patient know it?

A. Some of them wouldn't know anything about it, and some would know right off and say this, "I can't see as well as I could when I was in the office."

Now you don't know how much of a general complaint

that is either. You can put all the laughter in there that you want to on that. It just depends on how critical a person you get. You get me, and I am right there, and if those pictures are tilted a little bit,—and they are,—why I am going over there and straighten them up, but some other fellow isn't disturbed by the thing at all.

Q. The effect however would be that the picture was tilted in the patient's perception?

A. It may and may not be. I can't say.

Q. Would it be that the picture might be blurred?

A. It depends on the power and the axis, yes, and that you have to judge, I think, in all of this, as a combination of [fol. 816] a series of things which somebody has to test.

He then has done his best to carry out a very good mechanical adjustment, P D's, temples, and the right sized lenses and so they don't rub the ears,—those pieces back here (indicating,)—and all of that.

Then the patient goes back to the doctor, whoever that doctor may have been, who should then check and see that these are correctly made, with the lensometer we will say, and then if there is any complaint the doctor is the man who is presumed to know the nature of that complaint and its possible significance; so the constant trouble, I will say it that way, the difficulties in all of this are that somebody says, "Well I don't like these glasses."

The optician says, "I have done everything I know to make them right. I have checked the centers." He doesn't tell the patient that, but he has. "I have checked the powers, I have checked the angle." He has changed it a little, and has changed this a little, he can do that, and he has got those adjusted so I am not seeing double and so on. He has [fol. 817] done the best that he can as far as he knows.

Q. At that stage he has exhausted his skills?

A. At the moment, his skills.

And then, if there is further trouble, he says, "I think you had better go back and see your doctor," because obviously that is what he needs to do, because this very bill that we are discussing says that the prescriber shall be the ultimate—leave that out.

Mr. Phillips: Strike the comment with respect to that.

The Witness: I won't say anything about this bill, but

I will say this as a general statement, that the man who prescribes has to assume the final responsibility on the satisfaction of the material and everything concerned. He is the ultimate judge.

Mr. Phillips:

Q. In fact is it your opinion that that is true in all fields?

A. Has to be.

Q. Of visual care?

A. Has to be.

Q. Would it be true for example in the case of a physician who prescribed a hearing aid?

[fol. 818] A. It should be, but you know that it isn't so.

Q. Would it be true in the case of a physician who prescribed a false limb?

A. Yes.

Q. Or some other——

A. Well of course a man couldn't go out and just pick them up and try them out on somebody.

You take the field of hearing. You see, you asked me and I said that it should be but it isn't, because you can buy a hearing aid and if you don't like it you can throw it away and get another, but a limb, you have to have a measurement and an adjustment, just the same as this involves a measurement and an adjustment, so it is a little different.

Q. Would it be true with respect to the foot doctor who prescribes, who suggests a certain type of shoe?

A. Yes. That is the orthopedic surgeon.

Q. Yes, sir.

A. Or the podiatrist, or whatever you want to call him, foot doctor, or orthopedic surgeon. If you have an abnormality he would then have a shoe built in a certain fashion to support the arch or to raise the heel. Just a simple raising of the heel has straightened up many a hip, as you [fol. 819] probably can well guess, and eliminated many a pain. Yes.

Q. It is your opinion then that the physician in treating ailments of this character—ailments might be a technical word.

A. That is all right, let it go.

Q. ——ailments of this character is responsible for see-

ing that all measures are taken which will produce to the best of his ability the appropriate degree of relief?

A. I will say this, that he needs to know about everything that—if he is a skilled man and is desirous of doing everything he can for the interest of his patient—he should be able to be satisfied that either he or all those who have been associated with him in any manner have done all of the things which should be done.

Q. Now, Doctor, originally you were testifying with respect to the development of the field and of the education of opticians.

A. That is right.

Q. These services which you have been describing are those services which are within the field within which opticians are being educated?

[fol. 820] A. All these things that I have been talking about.

Q. Yes, sir, all these things that we have been discussing.

A. And a whole lot more, yes.

Q. And a lot more?

A. Yes.

Q. Would you explain——

A. If you want me to I will send you down my own book; I will have Russell Stimson send you his book; I will send these documents to any and all of you if you would like to see what is in them.

Q. To which of those books are you referring, sir?

A. The one on ophthalmic optics that has to do with spheres, cylinders, prisms, decentration, bifocals, trifocals, contact lenses, unequal image sizes, the whole field of these mechanical accessories or appurtenances toward enabling us to have better vision, no matter what the errors may be.

Q. In your opinion are all of the functions which are described in your book ophthalmic ——

A. Ophthalmic Optics.

Q. ——Ophthalmic Optics, the functions of a properly trained optician?

A. Yes. No matter—you may not want this statement [fol. 821] in.

Q. Yes, sir.

A. Irrespective of whether he is an optician or an optometrist, he should, and it would do no harm and would be very good if more ophthalmologists had more knowledge also.

Q. You commented that it would do no harm if ophthalmologists knew more of these functions. Do ophthalmologists receive training in the kind of services or skills which you have just been describing?

A. To a limited extent, yes. You may not want this in.

Q. Yes, sir, please keep it in.

A. They should have it, and I teach it to them in Tulane. For instance I shall tell you what I do myself all I can so that they know these principles, just as well as any optometrist and as well as any optician. I then take them to the wholesale houses where lenses are ground and made, and they get the experience there. Then take them where they are adjusted. You have the clinics in which these prescriptions are taken care of, and they see about the adjustment with the optician who does the adjusting. They study these topics.

[fol. 822] And why? First you can't be the boss and the master unless you do know it, and if you are going to be the supreme man you must know the details of all these matters, as well as in the great big things which are more outstanding.

Second, if he isn't going to be able for any reason to get his services rendered to him, or he lives in a community in which it is economically impossible for some optician to maintain such things separately, he probably will have to do it himself. So younger men today are beginning to think of it from those several angles; one, knowledge, and the other, self-protection.

Q. Is it your opinion however that in the present degree of training an ophthalmologist is not as adequately trained in this field, the average ophthalmologist is not as adequately trained in these services as a competent optician?

A. I think that is probably true, for the reason that his interest isn't in it. He is dependent upon and he wants to depend upon the skill of a man trained in that field that he doesn't desire to be thoroughly trained in and to practice.

The optometrist has the same interest, because he is [fol. 823] filling a prescription.

This man (indicating) is interested in refraction, diseases, treatment, diagnosis and operations, so he wouldn't be as concerned and skilled.

Q. Could you state an opinion with respect to the state of education and training of the ordinary optometrist as compared to a competent optician in the skills of which you speak under today's system?

A. Yes. It is going to be a sort of a—this is just a comment in passing, not to be put in. If I say this before I answer it, you will understand why.

The whole drive in optometry is to go toward professionalism, so if that is true, then less emphasis is being placed on the mechanical, so that the criticism is now brought against the teacher and professor in the schools of optometry that they don't teach sufficient mechanical and ophthalmic optics, and they belittle it. It is a legitimate objection and criticism.

Their fathers paid a great deal of attention to it. They begin to feel it is beneath their dignity, and that they won't do any more of that than does the ophthalmologist. [fol. 824] So therefore the stresses that were placed on mechanical optics perhaps commenced to be supplanted with more and more anatomy, and more physiology of the eye and more pathology, you see, and therefore you have got less time to do this. (Mechanical optics.)

Q. Yes, sir.

A. But over here then comes the man who had less of it because he hadn't any place to go, because if he goes to an optometry school he goes to be an optometrist, so he hadn't the opportunity of education, except as he got it under some dispensing optician, or he got it in some prescription laboratory, but now he has got the opportunity, not as good himself as his son——

Q. Yes?

A. ——or the optician does, or other men's sons, coming into this field to get the adequate training; so there is a tendency towards professionalism, for optometry is attempting to become, and is becoming more and more professional.

That means they are pulling away more and more from the mechanical, which is the right direction for them to go—according to me, that is; they won't all agree with

that—and that this man then, with the education pro-
[fol. 825] vided, is coming up, and he then becomes skilled, so that you have got now a very fine family.

You have got the man skilled in all these things, you have got the man skilled in accommodation and convergence and acuity and those things, and the other physical conditions and supervision.

Q. The first man, the man skilled in all these things, gesturing to your eye glasses——

A. That is right.

Q. ——by that you meant——

A. An optician.

Q. Yes?

A. We go back then, in the order of the optician first. He is then being trained into becoming more and more skilled in those things that are concerned with the mechanics and the optics of the visual appliances. They will overlap, as obviously is true.

This man (indicating) is becoming more concerned with the matters of vision, when it is not pathology, because pathology then he passes always up here (indicating). So he is concerned with matters of clear seeing.

[fol. 826] Q. This is the optometrist now——

A. Yes.

Q. ——of whom you are speaking?

A. Yes, and of course also the ophthalmologist, but we are confining him in his range of action. The optometrist as a professional man is more and more concerned with the getting of the data on the various visual functions such as ability to see clearly, the ability to convergency singly so he doesn't see double because of certain things, the ability to read the newspaper and so forth.

Q. Yes, sir.

A. And all of the things that have to do with vision as a process of seeing.

Q. Yes, sir.

A. Now that is what he is concerned about. Therefore he is concerned as a professional man with the thing, the prescription that he writes, plus one, 1.25 as combined with +1.75 cylinder, axis 45, combined with a one quarter prism—now we will say that is an illustration of what he is concerned with.

Mr. Harkey: Give that prescription again.

The Witness: One and a quarter (+1.25), or whatever [fol. 827] it is, sphere, (D S we usually write it) combined with +1.75 cylinder, that is 1.75 cyl. I put the axis—what did I say? 45? Because that is a possible optical axis of the cylinder.

Mr. Harkey: One degree prism base (in, out, etc.).

The Witness: That is one eye. Maybe it is the same for the other eye, maybe it isn't. Now that is a prescription.

Now when he leaves, then he is done with that, that is the optometrist is done with that prescription.

If he proceeds to become the optician he has to then do the things which a trained optician has to do, so he is an optician at that time.

By Mr. Phillips:

Q. I see.

A. And he is then concerned with the mechanics of putting this pair of glasses together.

Q. Would the development of optometry more toward the professional as you have testified, taking into consideration this field of interest of the ophthalmologist, would it be your opinion that it is becoming more and more important to develop a well trained competent group of opticians as a separate field in this country?

[fol. 828] A. Yes, I do.

Q. Is that the opinion of the leaders in the profession of opticianry?

A. In opticianry?

Q. Yes, sir.

A. Yes, in opticianry.

Q. Is that the opinion of the leaders in the profession of ophthalmology?

A. I would say yes.

Q. Is that the opinion of the leaders in the profession of optometry?

A. That is the question. You have asked me, and I will turn around and ask you, is it or isn't it?

Don't put that in the record. I will say it is not unanimous; it is divided.

No matter who does it, they know it is important, so that this man, as you asked me, this man, yes. It is a question who is going to do it. You see what I mean on that answer?

Q. I am not so sure that I see what you mean, sir.

A. Well——

Q. Will you amplify your statement?

A. They all believe in it, but the question is who is [fol. 829] going to do it.

Q. I see.

A. It is a matter of economics. If you want me to go further and say of my own knowledge that I know that, the American Optometric Association officially as a national organization went on record as saying, and you can find this in print, that they were desirous of being more and more professional because they were a profession.

Finally it has been accepted that they are. It was a long argument as to whether they were or not; but generally accepted. Number 1.

Number 2, that they did not propose to fill nor want their optometrists to fill the prescriptions of ophthalmologists. They can fill their own if they want to, but they were not a medium of filling.

And then this, I will tell you. I saw Dr. Jim Wahl last night, and this was the remark, "We are in favor of opticianry." So they have said so officially, that they were in favor of the right type of opticians.

Q. Well, you indicate that you have reservations with respect to such statement, sir, from your knowledge?

[fol. 830] A. Well that is a good question. Now can I answer it right and fairly? As far as I know myself they are to this moment holding to that thesis as a national body. Jim Wahl reaffirmed it; the president Wahl reaffirmed it to me last night.

Q. Now, sir, what steps are being taken in opticianry, if you know, to improve the training and education of their members to meet the situation which you describe?

A. Just a minute. I want to ask you what situation it is that I described?

Q. The situation that I meant, sir, is your testimony that there is a growing tendency to place more and more re

sponsibility in the optician to perform the kind of services you mentioned.

Mr. Harkey: I object. He didn't testify to responsibility. He testified that there was an effort to educate.

The Witness: Yes.

Mr. Harkey: But I believe the witness has made it clear throughout his testimony that the responsibility lies with the prescriber of the lenses, and must lie with him.

[fol. 831] Mr. Phillips: Yes. The word responsibility may be erroneous.

The Witness: You see that is why I was hesitating.

Mr. Phillips: Yes, sir.

The Witness: I must answer you the question and say that there are now three courses in the United States, first in 1946 at Rochester, Minnesota, the second under the University of the State of New York, the so-called Institute of Applied Optics—I don't mean applied optics; Applied Science, in Buffalo, New York, the third in the Los Angeles City College, have been created since that first one in 1946, with two-year courses, for the purpose of training adequately prepared, basically prepared—because you must get your experience after college, you know.

By Mr. Phillips:

Q. You testified, sir, that you were a professor or instructor in one of these schools?

A. Yes.

Q. Which one, sir?

A. Rochester, Minnesota.

Q. Have you with you a curriculum of opticianry offered by that school?

[fol. 832] A. I have. I would have to go to my room to get it.

Q. Will you furnish such a curriculum to the court reporter?

Mr. Harkey: If the witness can quote it approximately from memory I think that would be adequate.

Mr. Phillips: I think we would like to have an accurate curriculum of the school if you don't mind, Mr. Harkey.

Q. You need not do it right now, sir.

A. I will send you all, if you want—give me your names and addresses and I will send you articles I have written on it, the Guild, Opticianry Guild of Prescription Opticians, I will send you the college catalogues; I will send you at least a small volume to get the essence of it. I can say what it consists of essentially.

Q. Then will you state the essence?

A. Would you like that?

Q. Yes, sir.

A. It is two years. You come out with a certificate in opticianry, which you would expect, but they also grant at Junior College a degree of Associate in Arts if they attain a certain scholastic standing. That is the practice. That is the Junior College practice.

[fol. 833] The curriculum, the first year consists of such materials as are basic to any man who is in anywise engaged in anything of an engineering character.

Now I don't call this engineering, but it is—it isn't optical engineering, no, but it is below that grade, but involves the ability to handle mathematics and formulas and so on.

So your first year consists of solid courses in physics, it consists of a solid course in mathematics, algebra, trigonometry and a little of calculus.

It consists of courses in English, because you have got to have it. Even though the students don't want to take it, you have got to have it.

And there is one thing, you have the electives. In general you get psychology, you get economics; this being the thesis, that if he changes his mind he still has got a year of college work, whether it is pre-medical or pre-dental or pre-engineering and so forth.

Somebody else changes his mind and wants to come in. They have got pretty much of the first year.

[fol. 834] There is one course in optics in the first year of three hours credit in which he learns the grinding of glass, learns to block, begins to put some curves on. It is the introduction in the rough work in the manufacture of something that concerns opticianry.

The second year is practically wholly optics. He has then my course of six credit hours and he comes to me twelve hours to fifteen hours every week, and he goes then into the

mechanical optics, and he has six hours a week, and he then comes into one hour credit course, in which you go over something about an eye, how it is made up, what coats and so on, and the rods and the cones and so on, and a little of physiology and something about hyperopia, what it means, and myopia, so he can talk the language with the doctor, and then you continue on about the instruments that these men use, so that he will be acquainted with what they do, roughly.

And then he has some elective courses, so you put it solid on the foundation that it should be.

In addition he has a course, one semester, of some general biology, and he has a course in anatomy [fol. 835] and physiology of the body of a type that nurses would take.

Q. I see.

A. That is, he would know something about the body. Two principles, one, that he should know something as a matter of general background; second, that he should know specifically a good deal about the thing into which he is going.

Q. Do you not recommend to your students who are graduating from this course an apprenticeship?

A. Yes, we recommend it. In fact that school guarantees that everyone who graduates will have a job.

Q. Will you explain the importance of the apprenticeship?

A. Yes. The importance of the apprenticeship is this; he has endeavored to train his brain to do some thinking that he can't get anywhere else than he gets in the four walls of an institution.

We have trained his fingers, to become somewhat skilled, and to coordinate his brain with his fingers, but when he is out he must have, the same as any other man, practice to gain experience.

[fol. 836] He then needs it under some man who says—You may not want to put this in.

Q. Yes, I am sure we do.

A. "Kid, you are swell, you went to school, but there are

a lot of things that you don't know, that you will get from experience." And we know that that is only too true.

The only thing you can do for him in school is to found him on the fundamental principles.

Q. Yes, sir. Now then will you explain—Doctor, you stated that you were a member of the Board of Opticianry. You are president of the Board of Opticianry?

A. I was the first president, for three years.

Q. And now secretary?

A. I will give you the whole history. I was president for three years, that is all. If I hadn't been, there wouldn't have been any board. Don't put that in, but there wouldn't have been, because I was the only man that they believed had no axe to grind, that is how it is, because I wasn't making my living from any of it.

Q. Will you explain the function——

A. Then I was chairman of the Executive Committee, [fol. 837] then I became secretary.

Q. Will you explain the function of the Board of Opticianry?

A. Yes. And I will send you those documents and the brochures. They are here on the floor below.

Q. If you will just describe it to us roughly, sir.

A. The brochures concern the history and development of opticianry in which we give a little of the antecedents of who are the early folks in this field, and the development.

Q. Will you furnish one to the court reporter——

A. I will.

Q. ——for attaching to your deposition?

A. Yes, I will. And if you will make a list or send me a list of all these things, I will not only send you that, but I will send you anything more that I think might be of use.

Now let's go back to the board. Its functions were strictly of two characters. One was to support education in schools and see that they were established with adequate faculties and adequate curriculi. That is obvious.

The second was to examine graduates, not only the school examining, but they should then be examined [fol. 838] and certificated by the board so that they would then have a certificate issued to them. That brochure car-

ries the wording of these certificates, that they had completed this two-year course, et cetera.

Q. Is such a certificate similar to the certificate which is awarded a fellow of the Academy of Ophthalmology?

A. No. In a way. I will say in a way it has the same thesis, the same idea back of it, that it is by examination much more rigid in the case of ophthalmology, to be sure, but the idea is essentially that, that you examine and certificate men who have had previous training; so I will say yes, by all means, except not quite comparable.

Q. Not comparable in degree, but comparable in purpose?

A. In purpose.

Q. Is that it?

A. Exactly the same.

Q. I see.

A. Yes.

Q. Will you state whether you have been involved in any way in the promotion of legislation respecting the profession of opticianry?

[fol. 839] A. Had absolutely nothing to do with it. The board was not created for the purpose of legislation. I have felt that the board should have been a little more concerned about the matter of legislation, but it was set up to be concerned with education, certification by examination only, and that these other functions such as legislation should be carried out by all of the opticians, rather than a function of this board.

Q. Does the board approve the principle of an optician licensing law?

A. Yes.

Q. Officially?

A. Yes. I am sure that they would like to have the right types of laws, adequate laws creating the right kind of opticianry boards with requirements that specified in the laws the amount of training, the years, and the acceptance of schools certified by the board, for instance, as a proper standard, with such other measures as should go in there on the basis of what we might call exemption, because you have got to have something of that type in there, and then those that have been in a few years and cannot go to school [fol. 840] because they are too old but here you will assist

them with night courses and with special instruction; take the examinations of the board, plus their credits that they might get from a junior college or from an institution or college wherever that might be, and then pass those boards; there might be a few who could do that.

Q. Does the board approve the further extension in other colleges and universities of the establishment of opticianry schools such as you have described in your college, in Los Angeles and others?

A. Yes, they do, with this proviso, that these that we have got are made tops and are well supported before you start in to have some more.

Q. Do you know whether——

A. In other words if you have got two children or three children, you better take care of them before you get a dozen more of them.

Q. Do you know whether or not it is the official position of the board that such schools and such licensing laws are the proper solution of any public ills which may adhere in the present status of opticianry?

A. We are all convinced that proper training, plus a [fol. 841] protection to the one who is properly trained, would then not only protect him but it would protect the public, so everybody benefits by such adequate laws, and therefore we would all believe it would be good.

Mr. Phillips: Let's give our court reporter a recess for a few minutes.

(Whereupon a recess was taken.)

By Mr. Phillips:

Q. Doctor, you testified at length respecting the skilled services performed by opticianry?

A. Yes, whether it be performed by an optometrist, ophthalmologist or an optician, the skilled services that should be rendered, that is right.

Q. Does the optician have a merchandising function in the proper scope of his activities?

A. Yes. I don't think you could say no. You would have to say yes, because he is handling material things, and he isn't handling any professional things. In that sense

of the word he is a semi-professional artisan, is the best way I can explain it.

Q. In your judgment is that an essential part of his activities?

A. Before I answer let me ask just this question——

[fol. 842] Q. Do you want me to clarify my question?

A. You mean should he be interested in style?

Q. Yes, sir.

A. And all those things. Certainly. He should be. He should be expert in all the things that are for utility and that are fittest as a part of ourselves, and make us look the best we can be made to look, let's say.

Q. In your opinion is it meritorious for an optician to provide a sufficient selection of merchandise that the patients who are referred to him may be satisfied with what they find in his premises?

A. Well it may graduate all the way from the prescriber specifying, if he cares to, as to the type of frame, or he may then find the general desire of the person who has come to him to have rimless or brow-line, (just to use somewhat modern words) like you have (indicating,) brow line, to classify them, or tinted, or what not.

Yes, I think that one would say that he needs to have a reasonable number of these as an exhibit to indicate what the possibilities are in that field; in range, that is.

Q. In your opinion——

[fol. 843] A. Just the same as if you want some shoes or some suits of clothes, you have to give them some idea, yes, and then he will put them on and his wife says, "That is good," or she looks and says, "No, I don't like that."

Well they are not concerned with the real vital part of this prescription at all. They are concerned with the artistry of it.

Q. Is it your opinion then that an optician is properly concerned with the cosmetic features of the eye glasses or frames?

A. Yes, should be. Should be concerned with it.

Q. In your opinion, sir, is that part of his function a function which in the interest of public health and welfare is better performed by opticianry than by an ophthalmologist?

A. I don't think it is in the interest of the public health whether he has a pink spectacle or an up to date one or not. The thing that is in the interest of his efficiency and his own personal health perchance, (although that is questionable, in some cases) is the prescription and the lens. They are the essential thing.

Q. I see.

[fol. 844] A. And that the frame hold them in the right positions to afford the things which they should give optically.

Now whether the ophthalmologist or the optometrist or the optician does it is nobody's concern as long as it is well done.

Q. Do you know what views the leaders in the profession of ophthalmology take with respect to the furnishing of the kind or selection of frames which is ordinarily made available by an optician?

A. Well it runs the whole gamut of those that positively pay no attention to it, to those that pay a great deal of attention. You see it just depends upon the individual practitioner, really.

If the ophthalmologist sent the optician, or the strictly professional optometrist—and there are quite a number who are sending their prescriptions—if he sends it to the expert over here with a feeling that that expert will do all the things that will satisfy that patient, from the standpoint of the correctness of the prescription, the filling of it, and from the standpoint of the cosmetic and personal satisfaction of the eye wearer.

Q. Will you state whether or not it is the customary [fol. 845] practice of ophthalmologists to issue prescriptions for lenses to their patients, which may be filled at opticians of the patient's choosing?

A. Again that varies. Some do and some don't.

Of course a great deal of it is probably done on a referral to certain individuals who satisfy the ophthalmologist that they are capable of doing this work.

Now you begin to—now everybody in this room knows now that all of this is dynamite, because you just bring up this whole problem of what is he doing in rebating, and

all that, you see what I mean, so you have got all of that in the background when you ask me that question.

Q. I wasn't intending to elicit that.

A. I know you weren't, but I wished to be sure. He may issue it directly to some concern. He may say, the patient may say—or you may say, "Is there any optician with whom you are acquainted where you would like to have this prescription filled?" He might do that, or he may say——

Q. If I understand your statement correctly, that would be in the nature of a recommendation.

A. Yes. It can vary all the way from "Here it is, and [fol. 846] then go out and do as you please, but you come back because I am going to check to see it is right," to a prescription only directed to one person or one group.

It has the gamut of possibilities. It probably depends upon the size of the city, the size of the town, what he can get and what he can't; who is there.

Q. Would it or would it not be true however, sir, that even in the presence of a recommendation the patient would be entitled, with the prescription, to take it to an optician of his choosing?

A. I would say he would, but you would have a very large number of men who would claim that that prescription was their property.

Q. A large number of ophthalmologists you mean, sir?

A. Well, some. Many. I presume I can say that the optometrists claim, almost universally claim that that prescription is theirs.

Q. Well I was intending to exclude optometrists from my question, sir.

A. Yes, sir.

Q. I was directing it strictly to ophthalmologists.

A. Ophthalmologists. Well those practices vary enor- [fol. 847] mously in the degree in which the prescription is considered to be the individual's property or not.

I would say that it is. A prescription that the doctor gave me for a certain compound to the pharmacy is my property; he gave it to me. He is only concerned that I go, and I have to go to a registered pharmacist, so therefore that is taken care of and his interest then ceases.

But on the other hand the practices are varied on down

the line, so that some men still would say that I am sending you down to so and so, and some would say that this is your prescription and would recommend some men who might handle it, or give them a copy of it, so that if anything happens—well it can vary all the way along the line, as you might well guess.

Mr. Phillips: That is all the questions I have.

Cross-examination.

By Mr. Harkey:

Q. Dr. Sheard, I believe you testified that one of the things that you were trying to do as you had influence in the field of optics was to get the examiners out of the [fol. 848] jewelry stores and get them on a professional basis, is that correct, sir?

A. No, I didn't say it quite in that fashion. I said that optometry had started with opticianry in the jewelry stores quite a bit, and has grown out from it as the element——

Q. You think that is a good trend, that they want to get out of the jewelry stores?

A. Why yes.

Q. And drug stores?

A. Yes.

Q. And department stores?

A. I do.

Q. Now you gave as an example a lens prescription for one eye, a plus 2 diopter sphere, 1.75 cylinder——

A. Axis 45.

Q. ——axis 45, with a one degree base in. That would be a reasonable, ordinary prescription for a person, we will say with astigmatism, would it not, sir?

A. It would be not the ordinary amount of astigmatism, nor would prisms commonly be incorporated.

Q. No?

A. Because it is a little high for the ordinary amount.

[fol. 849] Q. That is an abnormal or rare lens in that type of prescription, in that range?

A. It is rather uncommon to this extent, that most of your prescriptions, either single or compound—these spheres or cylinders are compounds. They are not apt to run as high as 1.75 cylinder. They might run .50 to 1.00. That is much more common. I put it in and emphasized it for the reason that the higher the degree of error, the greater care and precision there has to be.

Q. Now if a person had a pair of glasses with that prescription in one eye, and that person had we will say an ear that was higher than the opposite ear, markedly so so that the frames were twisted, and we will say that he had one of these exotic tear drop shape lenses like we do have these days, how easy or difficult would it be to analyze and get that prescription accurately by checking this lens in a lensometer?

A. Well he still could take it and put it in the lensometer, determine the optical center, and he could then determine the axis, because they are marked.

Q. Can he put that axis——

[fol. 850] A. That little scratch, that little indicator where the horizontal is, you see what I mean, there is an indicator of that, and then when he has it in he can measure that, irrespective of what shape it may be, he still can tell, when it goes across this way (indicating,) you see.

Q. Yes?

A. Whether it is axis 180 or 145.

Q. With that one degree base in prism would the optical center of that lens properly be mounted outside the center of the eye?

A. Well whenever you put a prism in or out or up or down you of course then shift that optical center from the original straightaway position to throw the beam of light to the right or the left or up or down.

Q. In other words would that be a case in which that lens if broken should be duplicated without a re-examination or without checking the prescription accurately?

A. Whether it should be without re-examination is a question that I would have to pass, because if I would express the opinion it would depend upon how recent, how many months or years have gone by; but on the duplication

[fol. 851] of it I would say this, that the prescription ought to be had in such a case as that.

Q. Should have a prescription?

A. Then there is no possibility of an argument. Somebody has got to have the prescription available to be dead sure.

Q. Doctor——

A. Now he can do pretty well without it.

Q. If a student has finished that two-year course at say Rochester, Minnesota, in that course he would have study of the use of the lensometer, would he not, sir?

A. Yes, sir.

Q. Would that student be qualified at the end of that course to attempt to duplicate we will say a two-degree prism in a lens and should be able to measure it?

A. He should be able to measure it without any argument.

Q. Now after how much training on the lensometer should that student be able to accurately check that prism?

A. Well now the——

[fol. 852] Q. An average student.

A. Yes.

Q. Of average intelligence.

A. I cannot answer you that question with any degree of certainty, and I will tell you why. That is an instrument that, like any other instrument, you have got a dial and you turn it until you get it in clear focus, then you get the axis, and you get the amount and you find the center, or you find the prismatic element. Therefore, he doesn't need to know all about the optics of the lens in order to be able to use the instrument.

Q. It is an instrument in which human skill still plays a part even though it is an instrument?

A. That is right. He has to learn how to do that well.

Q. Can he learn that in fifteen minutes training?

A. No, no.

Q. Would it be more the result of say at the end of a 15 semester hour course in mechanical optics?

A. Well it is obvious that the more he does of that the more accurate he will be in every part of the performance, just the same as with the situation of anything that in-

volves skill and the determination of the elements involved. [fols. 853-854] —— data is right there. You take and adjust it this way (indicating.) I could show you and do it and so on, and yet the boss in that dispensing setup, or the boss in the branch office can do a better job than I can, because he is doing it all along.

Q. Doing it all the time?

A. Yes.

Q. Now, Doctor, is it your opinion that we would probably have better visual care if we would take the commercial angle out of the dispensing of optical supplies and put them on a purely professional basis?

A. Just what do you mean by commercial?

Q. Well, the bait advertising, luring people in.

A. Oh of course I would be absolutely against anything of that kind.

Q. Just against any advertising of that kind?

A. Any advertising of any kind.

Mr. Brantom: Any form of bait advertising I believe is what the doctor said.

The Witness: I don't claim to be an expert on matters of advertising, but I am saying to you that I would be opposed to any kind of advertising that would be, as we call, misleading advertising, but which the public wouldn't know is misleading.

[fol. 855] That is all I could say. I couldn't say that I am opposed to all kinds of legitimate advertising.

I think that a professional man can't advertise. How much a real skilled mechanic such as an optician can advertise is a moot question.

By Mr. Harkey:

Q. Is decentration rather important in placement of lens in a frame?

A. Well if you decenter it means you introduce a prismatic element, yes.

Q. That can be serious if it is carelessly done?

A. It can be if the prescription is a rather strong one:— well again, it is the power of the lens, and if you happen to decenter in the wrong direction——

Mr. Harkey: That is all.

Mr. Daugherty: Doctor, may I ask you a few questions, please, sir?

The Witness: Yes, sir.

Cross-examination.

By Mr. Daugherty:

Q. Among your many activities I would like to kind of get straight a little bit about your professional qualifications. You are a Ph.D., I believe?

[fol. 856] A. Yes, sir, as well as a Doctor of Science, Sc.D.

Q. Are you an M.D.?

A. No, sir.

Q. Are you an ophthalmologist?

A. No, sir.

Q. Then you don't of course belong to the American Medical Association?

A. No, sir.

Q. Now you are at present the secretary of the Board of Opticianry?

A. Yes, sir.

Q. And you have been president?

A. Yes, I was president for the first three years.

Q. Of that organization?

A. The chairman of the committee, then became the secretary, that is right.

Q. Now are you an optometrist?

A. Yes, sir.

Q. You hold a degree of optometry?

A. I built the schools. I created the degrees. There weren't any, so I am the father of the creation of a degree, and I hold only one. That is an honorary degree of Doctor of Ocular Science.

Q. I see.

[fol. 857] A. From the Los Angeles College.

Q. Are you licensed to practice optometry in some of the states?

A. I am licensed to practice in the District of Columbia. Have been for many years.

Q. Have you ever practiced optometry, Doctor?

A. Oh yes. I started the school and the college, ran the clinics at Ohio State University in the years I was there, from 1914 to—let's see, 1914 was when the course went in, and I think it was 1919 when I left.

Q. Have you practiced optometry as a practitioner since 1919?

A. No, I haven't practiced it, but I practiced ophthalmology with the ophthalmologists, and I have practiced optometry with the optometrists, and I have practiced opticianry with the opticians, if you understand what I mean. I have been a free lance on the basis of what I could contribute by reason of my knowledge.

Q. Well by practicing I mean coming in direct contact with the public.

A. In an office in which then I have had a public that has come to me? No, sir.

[fol. 858] Q. That is what I mean by practice.

A. No.

Q. I mean undertaking the professional relationships.

A. If I am down to Tulane, there will be the clinics there.

Q. Yes?

A. I will go in and serve an afternoon if I like, see what the boys are doing, check them, go back and get other data, and check on this and on that, so to that extent, yes, and to that extent, no.

Q. I am merely trying to find out——

A. Yes.

Q. ——just what your qualifications are on this subject, and as I gather it you are not a licensed ophthalmologist.

A. No, sir, and I wouldn't care if I were not a licensed optometrist or a licensed optician.

Q. Yes?

A. Because fundamentally I am a man interested in visual science, as an educator and a research worker.

Q. Well your principal qualification I guess then would be in the field of biophysics?

A. That is a general field. It covers physiological optics as a part. The thing for which I am noted the world over, [fol. 859] supposedly, is the broad field of physiological

optics, which has all to do with the fundamentals of things of vision.

Obviously I must be able to practice those things which I teach, and which I established and built, because it would be nonsense then if I couldn't do those things.

Q. I suppose you agree with the proposition that a person's eyesight is a rather precious thing?

A. I should say that of the five senses it stands at the top.

Q. I further take it that treatment of defective vision or disorders of the eyes should be treated and handled professionally?

A. Yes, sir.

Q. Do you recognize and agree with the fact that glasses, unless properly adapted, may seriously aggravate a condition and bring about nervous and physical disorders and discomfort and loss of efficiency?

A. I am laughing. It is surprising how much of that could be wrong and cause none of it, and it is surprising how little of it could happen and aggravate. Yes, it is possible.

[fol. 860] Q. You recognize that loss of efficiency can take place through improperly adapted glasses?

A. Well I will take my own case as an illustration. I will take off my glasses. I am not blind by any means, and I will never go blind for the lack of a pair of glasses. I see you in a general haze over there, and I see him.

I can leave these and forget them, and I pick up the newspaper and I can't read the headlines, none of the biggest things, so I am inefficient, very inefficient.

Otherwise no danger, no damage. Nobody can prove anything that that is true or isn't true. Probably nothing has ever happened, whether a pair of glasses is on or off, as far as the real disturbance of the rods and cones and all of the functions of vision which lie within the eye, but I would [illegible] and if my eyes were

In my case it is a big error, and won't cause such trouble—because nature just won't overcome it. Just can't [fol. 861] be done.

Q. Doctor, in your opinion is there anyone qualified to make an eye examination for the correction of defective vision but an optometrist or an ophthalmologist?

A. Not by law.

Q. What law are you speaking of?

A. Either one, medical acts or the optometric acts. The medical acts put no limitations. The optometric laws are limited.

Q. In your opinion is that a good law in the interest of public health and good visual care?

A. Oh yes. Oh yes, certainly.

Q. Do you think unqualified persons ought to be permitted to visually correct the eyes of another?

A. No.

Q. Is that a good law in your opinion for the protection of the public?

A. Yes, sir. That is, in the last analysis I had always been led to believe that that was the purpose of the law, was to be for the protection of the public and its betterment, and so you would have to say that by far and large such regula- [fol. 862] tions as would force men to become educated, cause certain things to be done whether they want to or not, all of that would tend to give the public a better service in the intangible things, which are the things of a professional practice.

Q. Doctor, if a person has defective vision and needs eye glasses to correct it, should an optician be permitted to furnish those eye glasses, except pursuant to the written prescription of either an ophthalmologist or an optometrist?

A. Well he has got to get the information as to what should go in this lens somehow.

Now we will say that the surest way to get it is to have the prescription in his own file, or the ophthalmologist has

Q. Let me ask you this question, let's take a youngster who has never had any glasses, and he develops defective vision——

A. Yes.

[fol. 863] Q. ——and needs glasses, let's say, to correct this defective vision.

A. Yes, let's say he needs them.

Q. Should an optician be permitted to furnish glasses to that young man unless he has got a written prescription covering an eye examination made by either an optometrist or ophthalmologist?

A. Initially he could not. He has to have the first prescription, that is right, because he couldn't—he can't examine an eye.

Q. I believe you have already testified, Doctor, that the optometrist or the ophthalmologist remains fully responsible for the visual care of his patient once the professional relationship arises between them?

A. That is exactly what should be the responsibility. He is the only one in the last analysis who can.

Q. You believe in professionalism, do you not?

A. Yes, sir.

Q. Do you feel that the relationship that exists between a person needing glasses and his optometrist or ophthalmologist is a professional relationship and should be a professional relationship?

Mr. Branton: Excuse me. You mean lenses when you [fol. 864] say glasses, do you, sir?

Mr. Daugherty: Yes.

Mr. Branton: Yes, sir.

The Witness: Just say it again. Do I believe——

By Mr. Daugherty:

Q. ——that the relationship existing between someone coming to an optometrist or ophthalmologist for lenses to [illegible] vision if that relationship shouldn't be

and findings are fundamentally between first yourself and the patient, yes, that is where it has to be originally, so that as far as the findings, or telling the patient what he found, it is the direct function——

Q. My question is, is that relationship a professional confidential relationship?

A. Fundamentally I come in to have somebody——

Q. Existing between doctor and patient.

A. Yes, come in, and I am in visual trouble, I cannot see, or I say I have headaches, and so on, then it is a professional relationship, and it involves all the elements of such profes-[fol. 865] sional care and treatment, so it is the business and it is the affair between the doctor and the patient.

Q. You feel that that relationship should be professional then?

A. Yes.

Q. And should be confidential?

A. To the extent that in so far as his findings are concerned, he generally records his corrections there, and all the data he puts down on the record sheet, all his data in examinations, and what the ophthalmoscope shows, and the retinoscope shows, and this and that and that and that, that he keeps, except when he discusses it with other professional men by reason of such meetings as these, in which those data are taken as X, Y, Z, that is for illustrative purposes, yes, and those findings are put there and they are confidential in the sense that they are kept by that examiner.

Q. Do you think that an optometrist or an ophthalmologist ought to hire himself out to a commercial interest and be under their control for the purpose of making eye examinations and writing prescriptions?

A. No, I don't.

Q. Do you feel that such an arrangement is bad [fol. 866] for the public welfare, public health?

A. Yes, and I will tell you why, it can't leave the man unbiased and free to do that which he should do.

Q. In other words the commercial aspect overpowers the professional treatment or treatment of the patient?

Q. You feel that eyesight, as precious as it is, should be treated professionally?

A. Yes.

Q. And on a professional basis?

A. Right. I don't say that the man in corporate practice may not do a very good piece of work. You understand that I am not saying anything about what may occur. He may give a very fine service, but you have not the operation of the elements that permit you to feel that an unbiased judgment has been arrived at, and if you want me to put it that way, that you aren't just being sold specs as fast as you can be sold specs.

Q. You think that is bad for the public welfare, do you not, the public pocketbook and public vision?

[fol. 867] A. Well to this extent, yes, he has got something which either is semi-unsatisfactory or wholly unsatisfactory, and he has got the one great advantage with this pair of glasses, he can throw them off, and that is a great big advantage. The rest of it you can't throw away sometimes. In other words he cannot lose his fundamental eyesight;—not his accuracy of form, but the fact that he can see.

Q. Do you think that ophthalmologists or optometrists should receive rebates or kickbacks from opticians?

A. No, sir.

Q. Do you think that it is in the interest of public welfare and for the good of the public that such practices might be made unlawful in a given state?

A. I think that should be everywhere, yes.

Q. And wherever that is done and that is the law you feel that that is good for the public interest and the public health and public welfare?

A. Yes. Now if the man who wrote the prescription and gave it to me told me that "You go over here and they will do good work, and part of my fee will come from that work," and it had been so stated in the prescription laboratory that we charge those prices set by the doctors, [fol. 868] and they receive part of their compensation from

the statement to you that rebating is bad, because it can't be done and done honestly.

Q. You think that is a good law then, do you?

A. All laws that prevent rebating or splitting of fees.

Q. Well, Doctor, getting back to——

A. Because that cannot be done honestly.

Q. Yes?

A. If the patient knew that the consultation fee was so much, and so much went to him (indicating), and so much went to him (indicating), and therefore it is specifically stated, you would know why and what was done; but if it isn't, there is deception, and then you have rebating and a split fee.

Q. Doctor, getting back to your testimony that you gave a minute ago to the effect that ophthalmologists and optometrists should not hire themselves out to make eye examinations for a lay person or a lay group or a commercial inter-[fol. 869] est, do you feel that the public welfare is served and the public interest is served by any prohibition which prevents that type of commercial control or professionalism? I believe that is the end of my question.

A. I don't quite get it.

Mr. Daugherty: Read the question to him, please.

(Question read by the reporter.)

The Witness: Well obviously if it was prohibited, and therefore was presumed not to exist, it would have been deleted and there couldn't be any question about it.

By Mr. Daugherty:

Q. That is good for the public welfare and public interest then?

A. One would say that as soon as you keep professional men professional, and keep professionalism so there isn't any possibility of taint, you have prevented them from doing the other thing, and therefore one would say, if we can believe in education and we can believe in ethics and

commercial control over professional eye examination, by any type of subterfuge or any other kind of arrange-
[fol. 870] ment, is in your opinion for the public good?

A. Should be beneficial.

Q. You don't feel that people should violate the principles which you have just given to support this, by indirection, in other words by subterfuge?

A. Oh no, no.

Q. Any prohibition which prevents subterfuges from being in existence is therefore good for the public interest, I take it?

A. I think so. Certainly the public can't protect itself. The only manner in which it can be reasonably well protected is by law.

Q. That is a very good statement.

Mr. Daugherty: I believe that is all.

Mr. Phillips: Do you have any questions?

Mr. Harkin: No.

Mr. Phillips: I have just a very few questions.

Redirect examination:

By Mr. Phillips:

Q. Your testimony is that a badly adapted pair of glasses could produce loss of efficiency and nervousness?

A. Well I said that it could be an element that would enter in, and I said there are many of these that did
[fol. 871] not produce any of them.

Q. Could you make the same statement with respect to a badly fitted pair of shoes?

A. Certainly.

Q. Could you make——

A. That is, if you have got something which causes irritation and discomfort, yes.

Q. You also testified——

A. And yet I might not be disturbed with something that the next fellow would be disturbed about.

Q. That is right. You also stated that you knew of no

ever gone blind for the lack of a pair of glasses, because inherently it is the same as it would be with a camera. Suppose a camera is out of focus. The camera still isn't injured. The ability,—if you can put it right in focus and produce the image,—is just the same and is inherently there no matter what the adjustment might be.

In this situation with the eye, if it is well nourished, the blood supply is as it should be, and there is no evidence of disease, then the images may still be indistinct, like I say [fol. 872] mine are markedly so without glasses and none of us yet have ever been satisfied that you could say that blindness had been caused, because blindness is a great deal different than the ability to differentiate details.

I can't give you any details of those pictures, but I know there are some pictures, but I have about sixty per cent visual capacity, because I can go down on the street and I can go my way, I could even drive my automobile, and I have done it time and time again; I have not lost the ability to see at all, I am not blind, but I am very definitely incapacitated and made inefficient.

Q. If I understand your testimony correctly, is it that you are stating that the incapacity is not increased, but it is not aided by virtue of a badly fitted pair of glasses?

A. No, because I want to tell you, suppose we have a squint because the eye turns in toward the nose, and here is the one eye that sees very well (indicating), here (indicating) the vision is low but there is still vision there, and if you cover this eye (indicating) it will begin to function, and therefore you have to get the straightening of these eyes in getting them to work together you have to get [fol. 873] the disused eye to begin to exercise itself.

This arm (indicating) could be strapped here (indicating). It wouldn't be dead. No. Of course to illustrate it would have to be interpreted in the right manner, that it would have to be exercised to bring it back and be restored, you see what I mean by that, and yet relatively speaking at the time it would be very inefficient.

Q. You have been speaking in terms of blindness, sir.

A. That I was, because of the fact that there are so many statements made, well they are going blind, they are going blind. Well you aren't going blind. You are just seeing

Q. Is it your opinion that the essential services of the optician are such as to make the prescription of the ophthalmologist or the optometrist effective?

A. That is right.

Q. If he should make unwittingly an error is it your opinion that he would physically damage the eye?

A. No, I don't think he will, but he won't give the patient the service that he should have.

Q. That is right. I see. Now you testified, sir, that [fol. 874] you believe it is detrimental to the public health and welfare for a department store or a jewelry store to hire an optometrist or a professional man because of the commercial aspect which automatically becomes involved once the department store or other interest which is interested in profits is involved. Let me ask you, sir, is not that same commercial aspect involved in an optometrist's dispensing eye glasses?

A. Well he dispenses his own.

Q. I see.

A. He gives an all over, an inclusive service, so it is included as a part of his service. Anyone who does that might be accused by somebody of having a commercial interest in the procedure, because he would then be furnishing the glasses, and therefore the question of his integrity might enter, but he is the only one involved and it is his standards and his ethics, which are one thing; but when he hires himself out to somebody else and is under the control so that he has got to sell so many pair of glasses, we will say, in order to get his job and keep it——

Q. Is it however to eliminate the possibility of the [fol. 875] commercial aspect in the practice of optometry that the leaders, as you have testified, are turning to the view that optometry should be a strictly professional activity?

A. That is the only reason. That is, if you are going to be professional, you have got to come over and be professional.

Q. I see.

A. Right.

Q. So you testified that in your judgment a confidential relationship is established between the optometrist and a

patient or an ophthalmologist and a patient when the patient approaches that professional man to seek eye care.

Let me ask you, sir, in your opinion is it a violation of that professional and confidential relationship for the prescription to be issued which may be taken to a qualified optician?

A. No, I don't think it at all, any more than if he gives me a prescription to take to the pharmacist is it a violation. Presumably it is the very thing which should be done, because how in the world am I going to get it if somebody doesn't send me where I can get it.

[fol. 875a] Mr. Phillips: I have no further questions.

Mr. Daugherty: One question, Doctor.

The Witness: Yes.

Recross-examination.

By Mr. Daugherty:

Q. Isn't it true that when an optometrist makes an eye examination and dispenses his own glasses that he is doing exactly the same thing that the dentist does when he pulls a tooth and inserts a bridge?

A. Well presumably the dentist is doing a little more than this optometrist even, because he is actually taking out and removing a tooth and so on, then he is doing a piece of surgery to that extent.

Q. My point is with reference to the materials needed to accomplish the professional service. Isn't it the same?

A. You mean the things that have to enter in?

Q. Yes.

A. The bridges?

Q. Yes.

A. The appliances, the prosthetic appliances to enable—in order to enable him to function as near normally, with [fol. 876] reference to his mouth, as these glasses enable him to function with reference to his eyes, yes. These are prosthetic appliances (indicating).

Q. The fact that an optometrist in correcting one's defective vision has to furnish materials is no different from a doctor having to put splints on a broken leg, is it?

A. No, and there is no reason why a doctor can't. Nobody says he can't.

Q. Still you have the professional relationship and a fee for services, isn't that right?

A. And I think the various situations that arise control somewhat that state of affairs, but you notice this always, that the professional fee is charged as a professional fee, and the services for the professional fee are the hours, he rates his time at so much an hour, as the dentist does, and so forth; but then the laboratory has to do these other things over here according to the measurements that he had to take as a professional man, so it is the same thing in a modified form.

Q. His fees for the professional services, together with such materials as are necessary to give a desired result to the patient's ailment or defective [fol. 877] vision?

A. That is right, so an optometrist includes those all in there, yes, to be sure, that is true.

Mr. Daugherty: That is all. Thank you, Doctor.

Recross-examination.

By Mr. Harkey:

Q. Instead of furnishing glasses as part of his services he might, say in the case of a welder, tell him to start using his welding hood all the time?

A. That is right.

Q. And stop looking at the sparks?

A. Yes.

Q. Or in the case of a youngster he might have to give him visual training?

A. Visual training, that is right.

Q. Now, Doctor, have you ever known in your experience of eyes that were injured from disease or trauma in which a person doing a visual examination failed to discover that condition?

A. That is, you mean has it ever happened that somebody——

Q. In other words I am wondering this, Doctor——

Mr. Daugherty: Now you are getting into the field of ophthalmology.

[fol. 878] Mr. Harkey: That is right. Strike that.

The Witness: I could answer it for you.

By Mr. Harkey:

Q. Well put it this way, Doctor, don't you think that visual examinations should be given by persons well qualified and trained to discover diseases of the body as reflected in the eye, and diseases of the eye?

A. Of course that, if I may be so bold as to say, is the weakness of the whole system, because the ophthalmologists, who ought to remember that the eyes are part of the human body, have to be reminded constantly of the fact that they are part of the human body.

He treats the specific thing, and not sometimes the body systematically. Sometimes a man fails to appreciate this fact.

Mr. Phillips: You are speaking of the optometrist?

The Witness: Of the ophthalmologist. He gets so involved specifically that he forgets, and he ought to be the first to remember, they are part of the body. And you say, as I have on occasion, "well now here, these eyes are part of the body." What else do you find? If you have hyperthyroidism, why don't you look for certain things? [fol. 879] You are just looking for specific things, what the correction is."

Now then presumably, in so far as it is possible, he is supposed to follow through, with the optometrist who, from certain indications and certain history says and draws the conclusion that there is a possibility of either local or systemic disease. He may have some evidence of it, then it is his business to make reference on the basis of the Golden Rule, that he would do for that patient what he would want somebody to do for him.

By Mr. Harkey:

Q. Are optometrists in general pretty good about referring patients to ophthalmologists or general practitioners when they discover conditions of that sort?

A. I would say in so far as the trainings have been increased and the skills and ability, yes. That is the ideal and the thing that should be done, but there is a little reticence.

Q. In other words the ethics of their profession require that they do it?

A. That is right. But if I refer my cases up and constantly lose them, then I may be tempted to hang on to them a little bit longer.

[fol. 880] Q. In those cases does the ophthalmologist usually refer them back down where there is a satisfactory inter-professional relationship?

A. Don't take this—When these men operate amongst themselves in such a manner that there is honesty and fairness, we will get along much better.

Mr. Phillips: Thank you very much, Doctor. You have done a splendid job.

Mr. Harkey: Doctor, you have a right to read this and sign it, or to waive it.

Mr. Phillips: You have a right to read this deposition and sign it, or you can waive the reading of it.

The Witness: I think that I had better read it, and I will tell you why, in the general sort of conversation which we have been pursuing, it may need to have some little deletion here or a qualification there.

Mr. Phillips: Sir, you wouldn't be entitled to delete.

The Witness: No?

Mr. Phillips: But you would be entitled to correct.

The Witness: Correct.

[fol. 881] Mr. Phillips: Correct errors.

The Witness: Well if I made too broad a statement—I don't know if I did anywhere.

Mr. Phillips: I think you were very cautious, but if you made a mistake, if there had been a mistake in your testimony——

The Witness: As far as I know, I don't remember anything in which I made any mistake.

Mr. Phillips: Now ordinarily——

The Witness: I may have emphasized it a little bit, or underestimated.

Mr. Phillips: Now let's do this, let's use the same procedure we used with Dr. Braley.

Mr. Harkey: Sure.

Mr. Phillips: We will have the clerk mail a copy of the deposition to you, and you make your corrections on it, and send it then directly to the court.

Charles Sheard.

[fols. 882-884] Certificate of Notary Public to Deposition (omitted in printing).

[fol. 885] In United States District Court

Plaintiffs' Exhibit 2

Oklahoma Optometric Association

Affiliated with the American Optometric Association

Office of the Secretary-Treasurer, John D. Gresham, O. D., Gresham Bldg., 113 N. Harrison, Cushing, Oklahoma.

March 13, 1953

Fellow Optometrists:

We Are Off To War.

Last Sunday a Chain outfit opened a cut rate, credit, nothing down, $1.00 a week, one half page add in the Tulsa World. The firm is operating in the Zales Jewelry Co.

This in addition to the spreading menace of the dispensing opticians has forced us to introduce into the legislature this past week House Bill # 953, and companion Bill Senate Bill # 294. (These are both the same bill).

Sponsors of the bill were Representatives Harkey of Idabel, Ham of Pauls Valley, Sandlin of Holdenville, Vandiver of Heavener, Welch of Broken Bow, and the following Senators; Senator Collins of Sapulpa, Hope of Pauls Valley, Cooper of Atoka, Cowden of Chandler, Price of Tulsa, Field of Texhoma.

Will you without fail get a letter to your Senator and Representative? Telling them you understand these bills have been introduced, and urge them to strongly support them in behalf of Optometry, and the vision of the public.

These bills should stop the unscrupulous practice of untrained men, from doing the same things that our boys have spent three to five years training to do. There are some fifteen spread over the State advertising in all manner.

We are enclosing herewith a few suggestions hurriedly prepared. We suggest in your letter that you use any, or all of these, but write the letter in your own words, and change these suggestions to suit your own phraseology. Add other suggestions that you think will help to get support.

Keep this letter confidential in your own hands.

This is every man's fight, and it must be to the finish.

Two things we do not want. First we do not want to have our present law amended. Second, we do not want the dispensing opticians licensed to practice.

Yours for victory, Billy, W. S. Farmer, O.D.

Confidential.

WSF em.

[fol. 886] Confidential.

Reasons

Section 1.

Optometrists and Ophthalmologists through their efforts of dealing with such cases as glaucoma, cataracts for surgery, and many other eye diseases, have been able to keep blindness at a minimum in the State of Oklahoma. Persons unqualified in eye care are unsafe and dangerous in dealing with human vision without the supervision of one trained and qualified to do so.

Section 2.

Optometrists are required to have five years training in colleges and universities before graduation anywhere in the United States and foreign countries; then they must prove their proficiency before a state board of examiners before being permitted to practice.

The Attorney General in this and several other states

has issued opinions in support of the above contentions—in effect that the examiner or prescriber is responsible to his patient for the complete results.

Section 3.

Because of the many dangers of the unwary and confused public practically all display advertising in the health fields is considered misleading, highly commercial, unethical and unprofessional by the professions of optometry and ophthalmology, as well as by professions in other fields of health care. We think this law will clarify the duties of all interested groups and protect the public's vision. Advertising persuades people to buy glasses whether they need them or not, which could result in damage to eyesight.

Section 4.

In addition to preventing soliciting and the use of cappers or steerers in this important field of eye care, this bill will also prevent a licensed professional person from hiring himself or his license out to a person without a license to practice or as a front for these unscrupulous men, companies, or firms who operate on a purely commercial basis. Optometrists cannot do this under our present law, but our law exempts physicians, and there are others—nothing more than laymen—doing this work. This bill will also help retain the doctor-patient relationship without the interference or control of a third party who is untrained and unqualified, and therefore, dangerous to the patient's welfare.

Section 5.

In spite of present laws and the Attorney General's Opinion in this and other states, some commissions, boards and other agencies continue to prevent the patient or person from choosing the legally qualified practitioner of his choice.

We believe this is a good bill with equality and justice for all concerned and definitely in the interest of reduced blindness and thus better vision for the public.

There are already two laws against discrimination, but

they do not care, all public agencies in this section will merely permit further discrimination.

Confidential.

[fol. 887] IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 14

(Seal)

Selected Examination Questions and Written Tests
given by the
American Board of Opticianry
or by
Schools of Opticianry

and used by the Board in connection with Written Examinations for Students Graduated from Schools of Opticianry Approved by the Board and Who Apply for Certification as Associate in or Master in Ophthalmic Optics.

No examinations are given to those applicants who are certified by the Board as Honorary Masters in Ophthalmic Optics. (See Manual of the Board for requirements for Honorary certificate.)

[fol. 888] Examination in Theoretical Ophthalmic Optics

1. Define refraction, diffraction, wavelength, refractivity, prism diopter, back focal length, effective power, toric surface, aphakia, aniseikonia.

2. What is the angle of deviation in degrees of a prism in which the principal angle is 10 degrees and the index of refraction is 1.62? What is the value of this prism in prism diopters? (Trigonometric tables will be furnished whenever needed.)

3. Find the change in effectivity of a lens which has a focal length of 25 centimeters if it is moved 20 millimeters away from a given plane of reference (such as the cornea).

4. What is the focal length and dioptric power of an assumed THIN double convex lens ground with a radii of 50 and 100 centimeters, respectively, and from glass with an index of 1.69? Answer this same question if the radii are —50 and —100 centimeters, respectively (double concave lens).

5. A lens has a thickness of 6.08 millimeters and the glass has an index of 1.52. If the dioptric powers D_1 (more remote from eye) and D_2 are 18 and —6 diopters, respectively, what is the back focal (or vertex) power of this lens?

6. If you have a +5.00 D. S. with a +3.00 cyl ax 90, what are the positions of the two principal focal lines and what is the value of the interval of Sturm?

7. A toric lense having the formula

$$-4.00 \text{ D. S.}$$
$$+3.00 \text{ D cyl ax } 45 \bigcirc + 5.00 \text{ D cyl ax } 135$$

is made of glass having a refractive index of 1.523. Find the radii of curvature of the toric surface in the two principal meridians.

8. If you desire a 40 millimeter round lens with a shop thickness of 1.2 millimeters, and with dioptric powers of the surfaces of +10 diopters and —6 diopters, what is the minimum thickness of the blank that must be used?

9. What is a "slab-off" prism? When would you use one? Assume any data you please and work out your answer to show the use of "slab-off" prisms or a difference in size of segments.

10. A fused bifocal has the following data: +2.50 D. S. ⊂ +1.00 cyl ax 180. Add +2.50 D. S. If the glasses used in the bifocal have indexes of refraction of 1.52 and 1.65, respectively, what is the power of the contact surface of the segment with the main lens? (Note: You may make your calculations on the basis of a sphero-cylindrical lens, or a —6 base curve.)

11. Discuss spherical and chromatic aberrations of lenses. How may these errors be minimized?

12. Select any fundamental relationship (or formula) in ophthalmic optics, state the theorem and prove it by geometry, algebra or trig-nometry.

[fol. 889] Examination in Practical Optics and Special Optics

1. How much displacement do you get with a 2 diopter prism at one-half meter? At 3 meters?

2. How much decentration, and in what direction, is necessary to produce a 3 prism diopter base out, right eye,

in a prescription of +2.50 D. S. ⌒ +4.00 cyl ax 90? If you need a 1.5 prism diopter, base up, what is your answer?

3. Calculate the amount of imbalance and give the type of bifocal that will give the smallest amount of vertical imbalance in the following case:

R.E. +1.00 D.S. ⌒ +1.00 syl ax 90
L.E. +3.00 D.S. ⌒ +1.50 syl ax 90
Add both eyes +2.00 D.S. 38 × 42

Segment 16mm. high Reading point 8mm. below

4. Calculate the curves on the following single vision lenses, +6.00 base curve, semi-finished cylinders: (a) +2.00 ⌒ +2.00; (b) +3.00 ⌒ −2.00; (c) −1.00 ⌒ −2.00; (d) −2.25 ⌒ +2.25 cylinder.

5. Define hyperopia, myopia, astigmatism, glaucoma, cataract, accommodation, convergence, cornea, optic nerve, ophthalmometer, ophthalmoscope.

6. Write a paragraph of about 200 words concerning the optical constants of the eye, such as length, dioptric power, corneal power, constituent parts or elements, indexes of refraction of media, coats of the eye, and so forth.

Examination in Ophthalmic Optics

Part I

1. Define refraction, reflection, diffraction, relative index of refraction, refractivity, prism diopter, back focal length, effective power, principal focal lines, interval of Sturm.

2. What is an Angstrom unit? To how many millimicrons is 6000 Angstroms equivalent? If the velocity of light is 3×10^{8} meters a second, find the frequency for light having the wavelength given in this question.

3. What is the angle of deviation (D) of a prism whose principal angle (P) is 60 degrees and index of refraction (n) is 1.62?

4. What is the relationship between 1 degree principal angle, 1 prism diopter and 1 degree deviation if $n = 1.68$?

5. What is the resultant value of the prism and the angle of the resultant prism if a 5 prism diopters B.A. 90

degrees is combined with a 10 prism diopters B.A. 180 degrees?

6. Suppose parallel rays of light pass from air into a denser medium of index 1.50 having a convex (toward air) surface with a radius of curvature of 25 centimeters. Find the posterior and anterior focal lengths.

[fol. 890] 7. If the radius of curvature of the cornea is 8 mm. and the index is 1.337, what is the dioptral power of the cornea?

8. Find the change in effectivity of a lens which has a focal length of 25 cm., if it is moved 2 cm. away from a given plane of reference.

9. What is the effective focal length or back focal length of two thin lenses of 10 and 8 inches, respectively, separated by 3 inches?

10. What is the focal length and dioptral power of a lens, in which the thickness is negligible, ground with radii of 50 and 100 cm., respectively, and from glass with index 1.64?

11. If we desire a 40 mm. round lens with a strap thickness of 1.2 mm. and with dioptral powers of the surfaces of +10 D and —6 D, what is the minimum thickness of the blank that should be used?

12. A lens has a thickness of 6.08 mm. and the glass has an index of 1.52. If the dioptric powers, D_1 and D_2, are +18 and —8, respectively, what is the back focal power of this lens, using both exact and simplified formulas?

13. A workman, in finishing a plano-convex lens with index 1.669, uses an ordinary 4 diopter tool calculated on the basis of index 1.523. What is the power of the lens thus obtained, assuming thickness negligible?

14. Transpose the following lenses into two spherocylindrical forms:

(a) +1.75 D. cyl ax 90 —5.00 D. cyl ax 180
(b) —3.25 D. cyl ax 45 +1.50 D. cyl ax 135
(c) —0.75 D. cyl ax 180

15. If we have a +5.00 D.S. with a +3.00 cyl ax 90, what are the values of the positions of the two principal focal lines and what is the value of the interval of Sturm?

Part II

1. Discuss the conditions under which you would advise the use of contact lenses. Also outline (or state) the chief advantages (mechanical and optical) as well as disadvantages of contact lenses.

2. I desire a lens with a back focal power of +10.00 D.S. ⊂ +2.00 cyl ax 180. Its thickness if 6 mm. and its index is 1.50. Selecting any base curve you wish, calculate the dioptric powers in each of the two principal meridians in order to obtain the desired vertex or effective power.

3. In question No. 2, what is its spherical equivalent? Also, if the lens specified in No. 2 does not give satisfactory results when worn by the patient, what may be the trouble(s) and how remedied?

4. If a —6.00 D.S. ⊂ —4.00 cyl ax 90 is moved from a position 12 mm. in front of the eye to 16 mm., what is the effect on both spherical and cylindrical corrections?

5. What is the interval of Sturm? Calculate the positions of the principal meridians in the following case: +3.00 D.S. ⊂ +1.00 cyl ax 75.

[fol. 891] 6. If an eye (reduced) has a radius of curvature of 5 mm. and if the posterior focal distance (depth of eye) is 21 mm. and index of refraction is 4/3, what is anterior focal distance?

7. What is the size of the image on the retina of an emmetropic eye (use reduced eye data) if an object 10 mm. in height is viewed at a distance of 5 meters?

8. A prescription calling for +4.50 D.S. — —2.00 cyl ax 180 is decentered 4 mm. in and 3 mm. up. What are the horizontal and vertical prismatic effects? What is the resultant prism and at what angle?

9. Discuss the sizes and positions of segments that should be worn in various hyperopic and myopic conditions and with high and low reading additions.

10. A fused bifocal has the following data: +2.50 D.S. ⊂ +1.00 cyl ax 180. Add +2 D.S. If the glasses used in bifocal blank have indices of 1.52 and 1.65, what is the power of the contact surface of the segment?

11. What is hyperopia, myopia, astigmatism, anisometropia, antimetropia, strabismus, glaucoma, ophthal-

mometer, ophthalmoscope, rectus muscles, phoria, exophoria, indirect astigmatism, chromatic aberration, spherical aberration?

Part III

1. Contact Lens. If the ametropic correction at a distance of 13 mm. from the cornea is +8.00 D.S. and if the dioptral power of the cornea is 43.70, index of fluid lens, 1.337, and thickness of fluid lens is 0.8 mm., find the power of the outer surfaces of the fluid lens (or inner surface of contact plastic lens) to correct the error. If the thickness of the plastic lens (index 1.49) is 0.5 mm., find the power of the outer surface in order that the full correction for the ametropia shall be in the water lens.

2. Contact Lens. Assume a case in which the radius of the cornea is 7.5 mm. Assume dioptric error to be —10.00 D. and that the correcting lens is 14 mm. from the cornea. Also assume that the corneal portion of the eye mold shows an extent of 12 mm. and a height of 2.5 mm. Suppose we desire to give the overall clearance of limbus of 3 mm. and an apex clearance of 1 mm. Find the anterior and posterior powers of the contact lens.

3. You have the following lens prescriptions: O.D. +2.00 ⊂ +1.00 cyl ax 180 and O.S. +3.00 ⊂ +2.00 cyl ax 180. Addition O.U. +1.00 D.S. Ultex A (19 × 38) segment, reading level 8 mm. below the distance O.C.; segment 3 mm. below. Find the total vertical prism in each lens. How might the prismatic difference be corrected in this case? Would it be possible to use a different sized segment before each eye and correct the prismatic imbalance at the reading distance?

4. What are your conclusions as to prismatic compensation at the reading level of 10 mm. if the prescription reads: O.D. +2.00 D.S. ⊂ +1.00 cyl ax 180 and O.S. +3.00 D.S. ⊂ +2.00 cyl ax 90?

5. What are the horizontal and vertical prismatic effects produced when an eye looks through a +4.00 cyl ax 60 8 mm. below the horizontal position? Would you, in general, recommend decentration of cylinders with axes oblique angles?

[fol. 892] Special Topics

1. Define prism diopter, the symbol p. d., accommodation, convergence, myopia, hyperopia, astigmatism, crystalline lens, cornea and optic nerve.

2. What is the meter angle? What is the convergence in meter angles and accommodation in diopters if an emmetrope looks at a point 25 cm. from the eyes? If the interpupillary distance is 60 mm., how many prism diopters of convergence are used in fixing a point 33 1/3 cm. from the eyes? Throughout how many degrees do the eyes actually turn? (Assume fixation object in a line with the nose.)

3. Where is the far point of a hyperope of 2 diopters? Of a myope of 2 diopters? What simple test can be made to discover the presence of astigmatism?

4. Write a paragraph concerning the optical constants of the eye such as length, dioptral power, corneal power, etc., thickness of crystalline lens and its curvatures, indices of refraction, and so forth.

5. What is visual acuity? Visual efficiency? If a letter should subtend an angle of 5 minutes in order to be seen normally, calculate the size of the letter which should be seen at a distance of 50 feet, normally (i.e., emmetropia).

American Board of Opticianry
222 West Adams Street
Chicago 6, Illinois

[fol. 893] In United States District Court

Plaintiffs Exhibit 15

(Seal)

Outlines and Syllabuses
Second Edition
American Board of Opticianry
222 W. Adams Street, Chicago 6, Illinois

General Statements

Mathematical and Theoretical Ophthalmic Optics. Examinations, both oral and written, will cover the subject

matter as outlined in the attached syllabus and will be concerned with mathematical and theoretical optical principles.

The Practical or Laboratory Examinations and applications of these mathematical, physical and optical principles will be given in another set of examinations. The syllabus or outline of subject matter concerning Laboratory Examinations in opticianry also is enclosed.

The Special Topics and examinations therein are outlined briefly in the third syllabus.

Preparation for Examinations

In preparing for these examinations the following suggestions are made:

1) There will be no examinations in algebra, geometry and plane trigonometry as such. However, the candidate must be able to use mathematical principles and theorems in the proofs of optical problems.

2) If you have had collegiate courses in mathematics (covering essentially algebra, geometry and trigonometry) and in physics, it may be possible for you to prepare yourself for these examinations by thoroughly reviewing fundamentals and covering the topics given in the syllabus through a mastery of the specified materials as given in the appended list of recommended texts and published documents.

3) If you have had collegiate courses but with insufficient training in mathematics, physics and optics, it is suggested that you tutor with high school or college instructors in these subjects, or by attendance at night school.

[fol. 894] 4) If you have not had any college training or any part of the required two years of collegiate training as outlined by the Board and now given in the Rochester Junior College, Rochester, Minnesota, New York State Institute of Applied Arts and Sciences, Buffalo, New York, and the Los Angeles City College, Los Angeles, California, it may be possible for you to complete these courses over a period of years by attendance at day or night school courses or by private tutoring.

The Board is desirous of assisting any applicants who may be able to qualify for the examinations and for certification as either an associate or as a master in ophthalmic

optics by way of suggestions or possible sources of assistance in preparation for the examinations. Such requests should be addressed to the Executive Secretary of the American Board of Opticianry.

1. Mathematical and Theoretical Optics

I. Phenomena of Light and Physical Optics—Light - Wavelength - Velocity - Illumination - Polarization - Diffraction and Interference - Spectra - Radiant Energy - Modern Concepts of Radiation and Atomic Energy.

II. Reflection—Reflection of Light from Plano, Concave and Convex Mirrors - Law of Conjugate Foci.

III. Refraction—Index of Refraction - Relative Index - Mean Refractivity - Refraction by Media with Parallel Surfaces - Lateral Displacement - Vertical Displacement.

IV. Refraction by Curved Surfaces—Posterior Principal Focal Length - Anterior Principal Focal Length - Dioptric Formulae for Single Refracting Surface - Applications to Ocular Calculations.

V. Thin Lenses—Relative Powers - Dioptral Formulae for Thin Lens in Air - Addition of Thin Lenses in Contact - Conjugate Foci with Thin Lenses - Magnification - Newton's Formula for Conjugate Foci.

VI. Thick Lenses—Formulae for Single Thick Lens in Air - Back Focal Length - Equivalent Focal Length - Compound Refracting Systems - Optical Data on the Eye.

VII. Focal Powers of Modern Ophthalmic Lenses—Approximate Power - Equivalent Power - Effective or Vertex Power - Neutralizing Power - Simple Formulae - Relation Between Vertex Power and Neutralizing Power - Applications of Formulae.

VIII. Effectivity of Ophthalmic Lenses—Effect of Changing the Position of a Single Spherical or Cylindrical Lens in Front of the Eye - Effect of a Change of Position of a Lens in the Trial Frame - Amount of Axial Hyperopia or Myopia Corrected by a Given Lens.

[fol. 895] IX. Cylindrical Lenses—Principal Meridians - Power Meridians - Properties of Crossed Cylinders - Rules for Transposition - Toric Lenses - Rules for Transposing (Torics) - Refraction of a Sphere-cylindrical Lens - Calculations of the Interval of Sturm - Interval of Sturm in the

Human Eye - Ophthalmometry - Artificial Astigmatism - Spherical Equivalent - Vertex Power of a Sphero-cylindrical Lens - Oblique Refraction of a Cylinder - Obliquely Crossed Cylinders - Cylindrical Effects of Oblique Cylinders and Spheres.

X. Refraction by Prisms—Prism Diopter - Centrad - Prisms at Right Angles - Oblique Prisms - Resultant Prisms - Effective Prism Power.

XI. Decentration and Prismatic Effects of Lenses—Effects of Decentration - Formulae for Decentration - Resultant Decentrations - Effects of Oblique Decentration - Decentration of Cylindrical Lenses - Decentration of Sphero-cylindrical Lenses - Prismatic Effects of Decentered Spherical Lenses (a) Distant Objects, (b) Near Objects - Prismatic Effects in Anisometropic Corrections.

XII. Aberrations of Lenses—Chromatic Aberration: Dispersion and Dispersive Index - Ratio of Refractivity to Dispersion - Dispersive Power - Achromatic Prisms - Achromatic Lenses - Chromatism of Fused Bifocals - Aberrations Due to Forms of Lenses: Minimal Axial Spherical Aberration in a Single Lens - Coma - Radial or Oblique Astigmatism - Curvature of Image - Distortion - Tangent Condition.

XIII. Design of Spectacle Lenses—Astigmatic Image Surfaces and Form of Lens - Wollaston and Ostwald Types - Point-Focal Spectacle Lenses: Investigations of Tscherning - Trigonometric Computation of Rim Ray - Peripheral Magnification of a Spectacle Lens - Vista or Field of View - Summary of Properties of Best Forms of Spherical Ophthalmic Lenses - Best Form of Astigmatic Spectacle Lens.

XIV. Bifocal and Trifocal Lenses—Optical Requirements of Bifocals - Monocentricity and Duocentricity - Curvature of Contact Surface of Fused Bifocal - Sizes of Segments and Prismatic Elements Introduced - Isometropic and Anisometropic Corrections - Prismatic Compensation - Slaboff Prisms - Bicentric Grinding - Multifocal Lenses; Types and Uses.

XV. Absorptive and Protective Glasses—Physiological Significance of Radiations of Various Types - Classification of Absorptive Lenses - Industrial Lenses.

XVI. Special Ophthalmic Lenses and Corrective Appli-

ances—Iseikonic Lenses: Physiological Processes of Binocular Vision - Lenses for Changing Size and Shape of Dioptric Images - Magnification of Zero Power Lenses - [fol. 896] Contact Lenses: - Theory of Contact Lenses - Effective Power - Equivalent Power - Magnification - Calculations of Afocal Contact Lenses to Correct Specified Ametropias. Telescopic Spectacles: Advantages and Disadvantages - Telescopic Spectacles for Near Work - Magnification - Simple Type of Telescopic Spectacle - Feinbloom Telescopic Lenses.

Text Books Suggested in Theoretical Ophthalmic Optics

1. Boeder, Paul: Introduction to Mathematics of Ophthalmic Optics, American Optical Company, Southbridge, Massachusetts.

2. Cowan, Alfred: Refraction of the Eye. Lea and Febiger, 600 Washington Square, Philadelphia, Pennsylvania.

3. Emsley, H. H. and Swaine, Wm.: Ophthalmic Lenses. Hatton Press, Ltd., 72-78 Fleet Street, London E.C. 4, England.

4. Henker, O.: Introduction to the Theory of Spectacles. Published by Jena School of Optics, 1924. A few copies are still available in this country.

5. Knox, G. W. and Ellerbrock, V. J.: Light, Vision and Lenses. Ohio State University, Columbus, Ohio. Univis Lens Company, Dayton, Ohio.

6. Morgan, M. and Peters, H. B.: Optics of Ophthalmic Lenses. Associated Students Store, University of California, Berkeley, California.

7. Obrig, T. E.: Modern Ophthalmic Lenses and Optical Glass. Published by Obrig Laboratories, 49 E. 51st Street, New York 22, N. Y. (1935).

8. Sheard, Charles: Ophthalmic Optics. Essay contributed to Medical Physics. Year Book Company, 304 S. Dearborn St., Chicago, Illinois.

9. Waters, E. H.: Ophthalmic Optics. (2 vols.) Published by the author. Eastern Optical Company, 1238 Florida Avenue, Corpus Christi, Texas. (This set of books contains much of mathematics, theory and practice.)

2. Practical and Laboratory Optics

I. History of Glass.

II. History of Lenses.

III. Curve Calculations—A. Spheres - B. Cylinders - C. Multifocals.

IV. Single Vision Spherical Surfacing.

V. Single Vision Cylindrical Surfacing.

VI. Round Field Lenticular Surfacing—A. Center Thickness - B. Edge Curves.

VII. Oval Field Lenticular Surfacing—A. Center Thickness - B. Cylinder Curves on Edge.

VIII. Multifocal Spherical Surfacing—A. Segment Size Control - B. Low and High Adds.

IX. Multifocal Cylindrical Surfacing—A. Thickness Calculation - B. Depth of Countersink.

X. Laying Out of All Types of Surface Work—A. Single Vision Spheres - B. Single Vision Compounds - C. Single Vision Prisms - D. Spherical Multifocals - E. Cylindrical Multifocals - F. Prism Multifocals.

[fol. 897] XI. Use of Lensometer or Vertometer.

XII. Cutting—A. Optical Center (Decenter to correct P.D.) - B. Axis of Cylinder - C. Axis of Prism - D. Height of Segment - E. Displacement of Segment - F. Size of Lens - G. Shape of Lens.

XIII. Machine Edging—A. Selection of Pattern - B. Size Setting - C. Tension Adjustment.

XIV. Hand Edging—A. Rimless Bevel - B. Insert Bevel - C. Rimless Hand Edging.

XV. Drilling and Mounting—A. Regular No-spring Strap - B. Regular Spring Strap - C. Thin Lenses - D. Thick Lenses - E. Precision Strap - F. Shursets and Rimways - G. Numonts.

XVI. Shell Work—A. Bridge Size Control - B. Shaping of Eye.

XVII. Lining Up of Shell and Metal Frames—A. Front Adjustment - B. Pad Adjustment - C. Temple Adjustment.

XVIII. Inspection—A. Power of Lenses (1) Optical Centers (2) Axis of Lenses (3) Lens size (4) Pupillary distance (distance P.D., reading P.D.) - B. Temples (1) Style of temples (2) Length of temples - C. Bridge (1) Style of bridge (2) Size of bridge (3) Pad adjustment.

XIX. Prescription Analysis—A. Vertical Imbalances - B. Horizontal Centers: (1) Distance (2) Reading - C. Styles of Multifocal Lens - D. Image Sizes - E. Sizes of Lenses and Reading Segments in Relation to Prescription Power - F. Position of Axis Controlling the Possibility of Rimless or Insert Lenses.

XX. Mechanics of Dispensing—A. Correct Method of Taking P.D. - B. Selection of Correct Style of Frame or Mounting: (1) Cosmetically correct, (2) Optically correct, (3) Occupationally correct - C. Size of Bridge - D. Size and Shape of Lens - E. Length of Temple - F. Preparation and Adjustment of Finished Eyewear.

XXI. Relationship of Dispenser to Patient and Prescribing Doctor:

I. Patient: A. Mental Attitudes and Economic Considerations - B. Correct Approaches - C. Final Adjustment of Eyewear to the face - D. Satisfying the Patient About Eyewear Selected - E. Advice to the Patient on the Use of his Glasses - F. Provision for Subsequent Repairs, Adjustments and Replacements - G. Assessment and Collection of Fees.

II. Doctor: A. Professional Etiquette - B. Condations under which Patient should be Referred Back to Doctor - C. Problems of Satisfying the Patient and the Doctor.

Text Books suggested in Practical and Laboratory Optics

1. Job Coach for Prescription Shop. Bausch & Lomb Optical Company, Rochester, N. Y.

2. Optical Shop and Counter. Johnson, Weeks and Weller, Professional Press, 5 N. Wabash Avenue, Chicago 2, Illinois.

3. Ophthalmic Lenses: Their History, Theory and Application. Bausch & Lomb Optical Company, 635 St. Paul St., Rochester, N. Y.

[fol. 898] 4. Human Eye in Anatomical Transparencies. Kronfeld and Polyak. Bausch & Lomb Optical Company, 635 St. Paul St., Rochester, N. Y.

5. Training Manual for the Prescription Laboratory. American Optical Company, Southbridge, Massachusetts.

6. Ophthalmic Lenses and the Prescription Shop. Har-

old J. Stead. Sharon Optical Company, Geneva, New York.

7. Essentials of Modern Lens Theory and Practice. T. H. Calkins. Continental Optical Company, 1402 N. Capitol Avenue, Indianapolis, Ind.

8. Spectacle Fitting and Optical Dispensing. L. S. Sasieni. Hammond, Hammond and Company, London, England (1950).

3. Special Topics in Opticianry

The applicant for examination will be questioned on his general background of knowledge and information which is relevant to his work as an optician and his contacts with professional men in the field of visual care and the public which he is serving.

Special Topics will include:

I. Essentials of anatomy of the eye and physiology of vision such as are found in textbooks of physiology.

II. Definitions of terms commonly used in refractive conditions, either monocular or binocular in character.

III. Optical instruments used in ophthalmic or optical work; knowledge of general principles and uses such, for example, as ophthalmoscope, retinoscope, lensometer or vertometer.

IV. Special types or kinds of ophthalmic prescriptions and various ways and means of providing satisfactory visual service.

Text Books suggested in Special Topics

1. Those cited under Ophthalmic Optics, mathematical and optical theory.

2. Textbook of Physiology.

3. Atkinson, T. G.: Oculo Refractive Cyclopedia and Dictionary. The Professional Press, 5 N. Wabash Avenue, Chicago 2, Illinois.

4. Borish, I. M.: Clinical Refraction. The Professional Press, 5 N. Wabash Avenue, Chicago 2, Illinois. (Introductory chapters on the refractive status and closing chapters on single vision lenses, absorptive lenses and so forth are excellent.)

5. Kronfeld and Polyak: Human Eye in Anatomical

Transparencies. Bausch and Lomb Optical Company, 6
St. Paul Street, Rochester, N. Y.

6. Lewis, J. J.: Ophthalmic Dictionary and Encyc
pedia. Published by author, 7 West Madison Street, C
cago, Illinois.

IN UNITED STATES DISTRICT COURT 477

PLAINTIFFS' EXHIBIT 18

COYE W. McCLURE, M. D.
1005 MEDICAL ARTS BUILDING
OKLAHOMA CITY 2, OKLAHOMA

PATIENT Vivas Warren Jowe

DATE 1/10 1952

		SPHERE	CYLINDER	AXIS	PRISM	BASE	INSERT	MAIL TO PATIENT
DISTANT	R	———	-0.25	05			RIMLESS	☐
	L	+0.25	-0.50	10			HOLES PER PAIR 2 3 4	SIZE & SHAPE
ADD FOR NEAR	R		SEG. SIZE		SEG. HT.		TINT	46 Lucency Lady
	L							
TOTAL	R							
	L							

UNIVIS D B R	PANOPTIK	FULVUE	ULTEX A. B. AL	ORTH D	KRYPTOK	TRIFOCAL

PUPILLARY WIDTH		FRAME OR MOUNTING
DISTANT	NEAR	Will choose Toffo Arthur
67		

LENSES DECENTERED		D.B.L.	TEMPLE		PATIENT'S MOUNTING ENCLOSED
			BACK OF EAR	TOTAL	
R ½	L ½	22	44		

REMARKS

Wm E Coye M.D.

899

478 IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 19

American Optical COMPANY

PRESCRIPTION SERVICE

JOB NO. N.B.J. | INSPECTED | RECEIVED

PATIENT L. J. Martin DATE

138 N. Edwards

Wichita, Kans

Bifocal Patient? YES NO

Lens Instructions

		SPH.	CYL.	AXIS	PRISM	BASE	Dec. IN
Dist.	R	-.50	-.25	165			
	L	-.50					
Add. For Read.	R	+2.00	Seg. Hgt. 3 mm.	Seg. Width 20 mm.	Seg. Inset R 1½ mm. L 1½ mm.	Total Inset & Dec. R MM. L MM.	
	L	+2.00					
Total Read.	R						
	L						

Tillyer | Contex | Toric | Flat | Bevel | Rimless

Drilling Instructions

Holes Per Pair: 2 3 4

MARK A CIRCLE AROUND STYLE WANTED — Other Colors

Panoptik | Ful-Vue Bifocals | Tillyer Bifocals A B D AA | Kryptok | Ultex | Cruxite A AX B C | Calobar B C D

Write size of eye here: 46 x 42

Give lens shape pattern number here: TV-406

Special lens details

Winslow mount

Cat. No.				No-Scru	14K	10K	GF	WHITE	PINK	YELLOW
BRIDGE MEASMTS	HEIGHT Above	Even	Below	POSITION OF CREST Forward	Even	Back	ANGLE OF CREST	WIDTH AT BASE		CUST. FRAME or MTG. ENC.

BRIDGE SIZE 24 PUPILLARY WIDTH 72 Distance Between Lenses 44 Spread of Pads { At Top / At Bottom

Width Between Temple 1 Inch Back of Joint | Length to Top of Ear 67 | Total Length 6½ | Angle of Joint

Other Frame or M't'g Details

Dark ⊙ LEAVE BLANK

71/C

Signature:

℞ NO.

50212V

TILLYER LENSES—VISION CLEAR TO THE EDGE

900-900a

IN UNITED STATES DISTRICT COURT 479

PLAINTIFFS' EXHIBIT 20

W. G. GILLETT, M.D.
D. O. HOWARD, M.D.
T. WALKER WEAVER, M.D.
JACK D. WEAVER, M.D.
EYE PHYSICIANS AND SURGEONS

OFFICE PHONE 2-1276 WICHITA 2, KANSAS 201½ NORTH MAIN

NAME Lloyd J. Martin AGE

ADDRESS City DATE Sept 13, 1951

R Ey Vo

VRE -50 = -25 Cy 165
VLE. -50
Add + 2.00
Full Vue Bifocal or
Panoptic

REG. NO. M.D.

REPT. ☐ NON-REPT. ☐
1, 2, 3, 4 TIMES P.R.N. ☐

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IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 21

TULLOS O. COSTON, M. D.
ROBERT I. TRENT, M. D.
708 MEDICAL ARTS BUILDING
OKLAHOMA CITY

Date 8/18/51

FOR Mr. Duke Duvall

DISTANCE

R. E.: Sph. ..... Cyl. ..... Axis ..... Prism ..... Base .....

L. E.: Sph. ..... Cyl. ..... Axis ..... Prism ..... Base .....

READING

R. E.: Sph. +1.50 Cyl. +0.25 Axis 45 Prism ..... Base .....

L. E.: Sph. +1.50 Cyl. ..... Axis ..... Prism ..... Base .....

REMARKS:

Phone 7-8551

Tullos O. Coston M. D.

901

[fols. 902-903] Plaintiffs' Exhibit 22 omitted. Printed side page 16 ante.

[fols. 904-955] Plaintiffs' Exhibit 23 omitted. Printed side page 18 ante.

[fols. 956-957] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 958] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., Appellants,

vs.

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, dba Douglas Optical; and Oran Ripps, Appellees

STATEMENT BY APPELLANTS OF POINTS TO BE RELIED UPON—Filed July 3, 1954

Mac Q. Williamson, Attorney General of the State of Oklahoma, Granville Scanland, County Attorney of Oklahoma County, Oklahoma, Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al, appellants herein, state that they intend to rely in this Court upon the following points:

1. The District Court erred in declaring the following portions of House Bill 953 (59 Okl. St. Ann. §§ 941-947) to be unconstitutional and void:

> Those portions of Section 2 (59 Okl. St. Ann. § 942), which make it unlawful for any person not a licensed optometrist or ophthalmologist "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or

any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other [fol. 959] optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist;

for the following reasons:

(a) Such provisions are an integral part of an act designed by the Legislature to protect, and to promote, public health and welfare;

(b) Such provisions are not arbitrary, capricious or unreasonable, but bear a reasonable and rational relation to the public health and welfare;

(c) Such provisions constitute a valid exercise of the police power of the State, and, as such, do not violate any of the provisions of the Constitution of the United States;

(d) Such holding of the District Court is contrary to the principles of law announced and applied by this Court in the case of Roschen v. Ward, Attorney General of the State of New York, 279 U.S. 337, 72 L.ed. 722.

2. The District Court erred in declaring the following portion of House Bill 953 (59 Okl. St. Ann. §§ 941-947) to be unconstitutional and void:

That portion of Section 3 (59 Okl. St. Ann. § 943), which makes it unlawful "to solicit the sale of * * * frames, mountings * * * or any other optical appliances";

for the following reasons:

(a) Such provision is an integral part of an act designed by the Legislature to protect, and to promote, public health and welfare;

[fol. 960] (b) Such provision is not arbitrary, capricious or unreasonable, but bears a reasonable and rational relation to the public health and welfare;

(e) Such provision constitutes a valid exercise of the police power of the State, and, as such, does not violate any of the provisions of the Constitution of the United States.

3. The District Court erred in declaring the following portion of House Bill 953 (59 Okl. St. Ann. §§ 941-947) to be unconstitutional and void:

> That portion of Section 4 (59 Okl. St. Ann. § 944), which provides that "No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store."

for the following reasons:

(a) Such provision is an integral part of an act designed by the Legislature to protect, and to promote, public health and welfare;

(b) Such provision is not arbitrary, capricious or unreasonable, but bears a reasonable and rational relation to the public health and welfare;

(c) Such provision is a necessary adjunct to the prohibition against corporate practice (the practice of ophthalmology or optometry by commercial interests) which is clearly within the police power of the State, in the interest of public health and welfare. [fol. 961] (d) Such provision is primarily directed toward the regulation of the professions of ophthalmology and optometry, which is clearly within the police power of the State, in the interest of public health and welfare.

(e) Such provision is necessary to discourage secret or subrosa arrangements between professional men and commercial interests through which commercial interests engage in the practice of a profession to the detriment of the public health and welfare.

(f) Such provision constitutes a valid exercise of the police power of the State, and, as such, does not

violate any of the provisions of the Constitution of the United States.

4. The District Court erred in permanently enjoining the appellants, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys of the State of Oklahoma from enforcing or attempting to enforce against the appellees the provisions of House Bill 953 (59 Okl. St. Ann. §§ 941-947) declared and adjudged unconstitutional and void for the following reasons:

(a) None of the provisions declared and adjudged to be unconstitutional and void are unconstitutional and void.

(b) Manifest oppression is not present which would justify a Federal Court in enjoining administrative officers of the State in the fulfillment of their duty.

5. The District Court erred in permanently enjoining the defendant, Zale's Jewelry Company, a corporation, from cancelling or terminating its lease to the appellee, Oran Ripps, on the ground of violation of the provisions of House Bill 953 (59 Okl. St. Ann. §§ 941-947), declared and adjudged to be unconstitutional and void for the following reason:

[fol. 962] (a) None of the provisions declared and adjudged to be unconstitutional and void are unconstitutional and void.

6. The District Court erred in holding in abeyance the counterclaim of the appellants and failing to declare the remaining portions of House Bill 953 (59 Okl. St. Ann. §§ 941-947) to be constitutional and valid and enjoining the appellees from violating the provisions of the same for the following reasons:

(a) The appellants made proper request for this relief in their counterclaim.

(b) The evidence in the case clearly indicated violations of remaining portions of House Bill 953 by the appellees.

(c) Upon the pleadings, evidnce and law, the appellants were clearly entitled to this relief.

Respectfully submitted, Mac Q. Williamson, Attorney General of Oklahoma, Fred Hansen, First Assistant Attorney General, James C. Harkin, Assistant Attorney General, Attorneys for Appellants.

Certificate of Service (omitted in printing)

[fols. 963-964] [File endorsement omitted.]

[fol. 965] In the Supreme Court of the United States, October Term, 1954

No. 185

Lee Optical of Oklahoma, Inc., a corporation and Ellis Carp, dba Douglas Optical, Appellants,

vs.

Mac Q. Williamson, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., Appellees

Statement by Appellants of Points To Be Relied Upon—Filed July 2, 1954

Lee Optical of Oklahoma, Inc., and Ellis Carp, appellants herein, state that they intend to rely in this Court upon the following points:

1. The district court erred in failing to find and declare that the portion of Section 3 of House Bill No. 953 (59 Okla. St. Ann., Section 943) that makes it unlawful for any person "* * * to solicit the sale of spectacles, eye-

glasses, lenses * * * prisms * * * by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; * * *" violates Article I, Section 8, of the Constitution of the United States and the "equal protection" and "due process" [fol. 966] clauses of the XIV Amendment thereto in that:

(a) Such Section 3 places an unreasonable burden and restraint on interstate commerce by completely prohibiting all advertising of spectacles, eyeglasses, lenses and prisms.

(b) By prohibiting all advertising such section takes property rights of appellants without the due process of law guaranteed to them by the XIV Amendment to the Constitution of the United States.

(c) Such Section 3 denies appellants the equal protection of laws guaranteed to them by the XIV Amendment to the Constitution of the United States by completely prohibiting all advertising of spectacles, eyeglasses, lenses and prisms, all of which are standard commercial articles when other comparable standard commercial articles are not subject to any like advertising prohibition.

2. The district court erred in refusing to admit in evidence appellants' offered Exhibit 2.

Respectfully submitted, Duke Duvall, 1501 Liberty Bank Building, Oklahoma City (2), Oklahoma, [fols. 967-969] John M. Phillips, Dick H. Woods, Nine West Tenth Street, Kansas City (5), Missouri, Attorneys for Appellants.

Acknowledgment of Service (omitted in printing)

[fols. 970-971] (File endorsement omitted.)

[fol. 972] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

Nos. 184 & 185

[Title omitted]

Appeals from the United States District Court for the Western District of Oklahoma.

ORDER NOTING PROBABLE JURISDICTION—October 18, 1954

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted and the cases are consolidated for argument.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL., *Appellants,*

vs.

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, D. B. A. DOUGLAS OPTICAL, AND ORAN RIPS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATEMENT AS TO JURISDICTION

MAC Q. WILLIAMSON,
Attorney General of Oklahoma,
FRED HANSEN,
First Assistant Attorney General,
JAMES C. HARKIN,
Assistant Attorney General,
Counsel for Appellants.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	1
Jurisdiction	2
Question presented	3
Statute involved	3
Statement	3
The questions are substantial	6
Appendix "A"—Opinion of the United States District Court for the Western District of Oklahoma filed March 1st, 1954	16
Appendix "B"—Judgment and Decree of the United States District Court for the Western District of Oklahoma filed March 29th, 1954	46
Appendix "C"—A Copy of House Bill 953 of the Twenty-fourth (1953) Oklahoma Legislature entitled "An Act Relating to Visual Care; Defining Terms; Prohibiting Dishonest and Dangerous Practices in the Sale of Optical Goods and Devices; Prohibiting Discrimination; Making the Act Cumulative to Other Laws; Making Violation of Act Misdemeanor Authorizing Injunction Against Violators"	48
Appendix "D"—Opinion of the United States Supreme Court in the Cases of William Roschen vs. Hamilton Ward, etc., et al. and S. S. Kresge Company vs. Hamilton Ward, etc., et al., Docket Numbers 667 and 668 of the October Term, 1928	52

Table of Cases Cited

City of Springfield v. *Hurst*, 56 N. E. 2d 185	7
Commonwealth v. *Ferris*, 25 N. E. 2d 378	10
Commonwealth v. *Kresge Company*, 166 N. E. 558	7
Curtis v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P. 2d 427	6

Page

Hawks, et al. v. Hamill, et al., 288 U. S. 52, 77 L. ed. 610 13

Herkness v. Irion, 278 U. S. 92, 49 S. Ct. 40, 93 L. ed. 198 3

Interstate Busses Corporation v. Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. ed. 551 3

Klein v. Department of Registration and Education, 105 N. E. 2d 758 9

Neill, et al. v. Gimbel Brothers, Incorporated, 199 A. 178 10

Palmetto Fire Insurance Company v. Conn, 272 U. S. 295, 47 S. Ct. 88, 71 L. ed. 243 2

Rithdz v. Commonwealth, 35 S. E. 2d 210 9

Roschen v. Ward, Attorney General of the State of New York, 279 U. S. 337, 73 L. ed. 722 6

Sears Roebuck and Company, et al. v. State Board of Optometry, 57 So. 2d 726 11

Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608, 79 L. ed. 1086 6, 9

South Carolina State Highway Department v. Barnwell Brothers, 303 U. S. 177, 82 L. ed. 734 13

State of Louisiana v. Rones, 67 So. 2d 99 7

STATUTES AND OTHER AUTHORITIES CITED

Constitution of the United States, Article 1:

Section 8 2
Section 10 2

Fourteenth Amendment, Article 1 2

House Bill 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Oklahoma Statutes Annotated:

Sections 941 through 947) 3
Section 1 4
Section 2 3, 4
Section 3 3, 4
Section 4 3, 4
Section 5 3
Section 6 3

Page

Oklahoma Statutes, 1951, Title 29, Chapter 11 4
Chapter 13 4

Oklahoma Statutes Annotated, 1953, Title 59, Chapter 24

Section 941 3
Section 942 5
Section 943 5
Section 944 5
Section 945 3
Section 946 3
Section 947 3

United States Code Annotated, Title 28:

Section 1253 2
Section 2201 2
Section 2202 2
Section 2281 2

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6002—Civil

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, D. B. A. DOUGLAS OPTICAL, AND ORAN RIPS, *Plaintiffs,*

vs.

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL., *Defendants*

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the County Attorneys of the seventy-seven counties of the State of Oklahoma, defendant-appellants herein, make the following statement as to the basis upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment and decree entered and filed in this cause:

I

Opinion Below

The opinion and partial dissent thereto of the District Court of the United States for the Western District of

Oklahoma is not reported. A copy of the opinion and partial dissent of Circuit Judge Murrah are attached hereto as Appendix A.

II

Jurisdiction

This is a civil action commenced by the plaintiffs in the District Court of the United States for the Western District of Oklahoma in which they seek to have portions of an Act of the Oklahoma State Legislature relating to the visual care of its citizens declared unconstitutional and void, under Section 2201 of the Judicial Code of the United States (28 USCA § 2201) and State officials enjoined from enforcing the same, under Sections 2201 and 2202 of the Judicial Code of the United States (28 USCA §§ 2201 and 2202), for the reason that said portions of said Act violate Sections 8 (Interstate Commerce) and 10 (Obligation of Contracts), Article 1 of the Constitution of the United States and the "due process" and "equal protection" clauses of Article 1 of the XIV Amendment to the Constitution of the United States.

As required by Section 2281 of the Judicial Code of the United States (28 U. S .C. A. §2281), the matter was heard by a District Court of three judges. On the 29th of March, 1954, the three-judge court, with the Circuit Judge dissenting in part, entered and filed its judgment and decree. A copy of this judgment and decree is attached hereto as Appendix B. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Section 1253 of the Judicial Code of the United States (28 U. S. C. A. § 1253). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment and decision of the District Court on direct appeal in this case: *Palmetto Fire Ins. Co.* v. *Conn*, 47 S. Ct. 88, 272 U. S.

295, 71 L. ed. 243; *Interstate Busses Corp.* v. *Blodgett*, 48 S. Ct. 230, 276 U. S. 245, 72 L. ed. 551; *Herkness* v. *Irion*, 49 S. Ct. 40, 278 U. S. 92, 73 L. ed. 198.

III

Question Presented

The primary question presented in this appeal is whether or not said Act of the Oklahoma Legislature, relating to the visual care of the public, is so clearly violative of the constitutional and statutory provisions of the United States, referred to in the complaint, as to warrant the three-judge federal district court:

> (a) entering a declaratory judgment holding portions of said act unconstitutional and void, and
>
> (b) issuing an order enjoining the Attorney General of Oklahoma and each of the seventy-seven county attorneys of said State from enforcing or attempting to enforce such provisions of said Act by criminal or civil proceedings authorized therein.

IV

Statute Involved

The statute of the State of Oklahoma involved is House Bill 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947). Said bill, with Sections 2, 3, 4, 5 and 6 thereof divided for sake of clarity into their constituent parts, is attached hereto as Appendix C.

V

Statement

House Bill 953 is an Act relating to the visual care of the people of Oklahoma. Its primary aim is to assure that the citizens of Oklahoma receive the best possible visual

care and to protect the public against various activities in the field of visual care which are detrimental to the public interest, health and welfare. To a certain extent, the activities of the ophthalmologist and the optometrist (that is, persons licensed under provisions of Chapters 11 or 13, Title 59, Oklahoma Statutes 1951—see Section 1 of said house bill), both professional practitioners in the field of visual care, and the activities of the optician, a non-professional in the field of visual care (not licensed in Oklahoma), are regulated and controlled by the provisions of this law as their activities pertain to the visual care of the public. In other words, this is not solely a medical law, an optometry law, or an optician law. As its title indicates, it is a law relating to visual care and its provisions embrace the activities of all those involved in furnishing corrective eyeglasses and visual care to the public.

Section 2 of House Bill 953 provides for professional responsibility in the matter of prescribing, fitting, adapting and duplicating eyeglasses for visual correction, but authorizes the optician to prepare or grind lenses, fit and adapt eyeglasses to the face, and to duplicate a lens provided he has the professional prescription for the eyeglasses in his shop. And the optician may continue to do said acts on said prescription.

Section 3 of House Bill 953 prohibits the solicitation of the sale of eyeglasses, lenses, frames, mountings, etc., through advertising means by any person, be he ophthalmologist, optometrist, or optician. This section is aimed at protecting the public from bait and misleading advertising and other unscrupulous and unethical means of advertising whereby the visual care of the public is handled without proper professional care and responsibility.

Section 4 of House Bill 953 prohibits rebates, the solicitation of eye examinations, the hiring of physicians or optometrists to make eye examinations by lay persons or lay

bodies, and in furtherance of such prohibition against the corporate practice of ophthalmology or optometry, prohibits a retail merchandising establishment from subleasing departments or renting space to doctors wherein they may examine eyes for corrective eyeglasses.

The District Court has declared the following portions of Section 3 of House Bill 953 to be unconstitutional and void:

> (a) Those portions of Section 2 (Title 59, Chapter 24, Section 942, Oklahoma Statutes), which makes it unlawful for any person not a licensed optometrist or ophthalmologist "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist;

Circuit Judge Murrah concurred in the above portion of the opinion and judgment "with reluctance and some misgivings."

The District Court with Circuit Judge Murrah dissenting declared the following portion of Section 3 of House Bill 953 to be unconstitutional and void:

> (b) That portion of Section 3 (Title 59, Chapter 24, Section 943, Oklahoma Statutes), which makes it unlawful "to solicit the sale of * * * frames, mountings * * * or any other optical appliances";

The District Court with Circuit Judge Murrah dissenting declared the following portion of Section 4 of House Bill 953 to be unconstitutional and void:

> (c) That portion of Section 4 (Title 59, Chapter 24, Section 944, Oklahoma Statutes), which provides that

> "No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store."

The stated basis for such declaration of unconstitutionality is that said portions of the Act do not fall within the police power of the State of Oklahoma and they have no real or rational relation to the public health and welfare.

VI

The Questions Are Substantial

The Supreme Court of the United States has considered the general problems involved in the present litigation in the cases of *Roschen* v. *Ward, Attorney General of the State of New York*, 279 U. S. 337, 73 L. ed 722, and *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 79 L. ed 1086. The Oklahoma Supreme Court has considered some of the problems in the case of *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P. 2d 427. The judgment and decision of the District Court fails to apply the principles of law announced in the above cases even though they are fully applicable and controlling. Rather, the judgment and decision of the District Court condemns certain provisions of the said Act of the Oklahoma State Legislature and enjoins State officials from enforcing such provisions and the criminal and civil liabilities attendant thereto.

The case of *Roschen* v. *Ward*, supra, involves the New York law which makes it unlawful to sell at retail any eyeglasses or lenses for correction of vision unless a duly licensed physician or optometrist be in charge of and in personal attendance where such articles are sold. Mr. Justice Holmes delivered the opinion upholding said law as a

valid enactment of the police power of the State of New York. Since the opinion in this important case is concise and controlling in this matter, we will, for convenience, set the same out in full as Appendix D hereto. In substance, Section 2 of House Bill 953 is similar if not identical in import with the provisions and intent of the New York statute. If New York can validly restrict the sale of eyeglasses for visual correction unless a physician or optometrist be in charge of and in personal attendance, cannot Oklahmoa require that opticians furnish glasses only upon the prescriptive authority of a physician or optometrist? Also, see *Commonwealth* v. *Kresge Co.* (Mass.—1929), 166 N. E. 558, wherein the Supreme Court of Massachusetts upheld a similar law passed by the Massachusetts Legislature as a valid enactment of the police power of the State, holding: "The main intent of the Legislature in enacting the statute here assailed was to preserve and promote the public health."; and *City of Springfield* v. *Hurst* (Ohio—1944), 56 N. E. 2d 185, wherein the Supreme Court of Ohio states: "The sale of eyeglasses by a retail vendor may be regulated if not prohibited altogether."

The recent case of *State of Louisiana* v. *Rones* (La.—1953), 67 So. 2d 99, upheld very comprehensive advertising prohibitions against the sale of eyeglasses, which included retail dealers, as a valid exercise of the police power covering a subject involving the public health and welfare. The decision in this important case reads in part as follows:

> "The courts of other states have had occasion to consider the validity of statutes regulating the advertising by retail dealers of eyeglasses. In some of the cases the courts have concluded that such regulation was reasonable and proper and constitutional. * * * We are in accord with the views of those upholding such statutes. These courts have decided that the statutes are a reasonable exercise of the police power

> because they prevent 'bait advertising' which attracts the unwary to purchase inferior glasses; eliminate the temptation to, and the pressure upon, customers that result from the assurance that no more than a named price will be charged; protect an uncautious and unwary public from being misled and deceived; prevent the increase in sales and the incidental harm that comes from unfitted eyeglasses; eliminate to some extent poor quality and poor workmanship which naturally result from the desire to sell spectacles in quantity at a low advertised price for the purpose of underselling competitors."

The case of *Curtis* v. *Registered Dentists of Oklahoma*, *supra*, involved the activities of a dental laboratory technician who was engaged in an advertising campaign and course of conduct in violation of the statutes of Oklahoma. The Oklahoma Supreme Court in its opinion held:

> "* * * we are of the opinion that it is apparent that it was the intention of the Legislature to protect the public from any person who might undertake to engage in the practice of dentistry without license to do so, and that part of its purpose was to prevent anyone other than licensed dentists supplying artificial substitutes for natural teeth to the persons who would use them. An examination of the stipulation of facts discloses that defendant, who had no license to practice dentistry, was engaged in the business of supplying substitutes for natural teeth to the public at large through advertisements in the newspapers and the telephone directory which patently were designed to induce the public to believe that the defendant was authorized to engage in the practice of dentistry by supplying artificial substitutes for natural teeth. This constituted a direct violation of the provisions of the statute quoted, supra, against a person holding himself out, or employing methods in any way representing himself as being engaged in the practice of dentistry. That the states may enact legislation of this type for

the protection of citizens is well settled. See Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 79 L. Ed. 1086."

In *Ritholz* v. *Commonwealth* (Va.-1945), 35 S.E. 2d 210, the Supreme Court of Virginia held:

> "The better reasoned cases hold that restrictions and regulations of the sale of eyeglasses are measures directed to the prevention of substantial harm to the public health and are within the exercise of the police power of the State. * * *
>
> "We cannot say that this particular legislative policy of regulating and restricting the advertisement of prices and the sale of spectacles and eyeglasses as merchandise is so arbitrary or unreasonable as to contravene the proper exercise of the police power of the Commonwealth. * * * Mr. Chief Justice Hughes, in Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 612, 55 S. Ct. 570, 572, 79 L. Ed. 1086, addressing his remarks to the constitutionality of statutes regarding the practice of dentistry, used this language: 'We do not doubt the authority of the state to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities but with the vital interest of public health * * *.' Furnishing glasses affects the public health as much as furnishing artificial teeth. See Ritholz v. Johnson, supra; Ritholz v. Arkansas State Board of Optometrists, 206 Ark. 671, 177 S.W. 2d 410, 411; Commonwealth v. Ferris, supra."

And, see *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S. Ct. 570, 79 L. ed. 1086, wherein the United States Supreme Court upheld an act of the Oregon Legislature regulating and restricting advertising in the field of dentistry; and see *Klein* v. *Department of Registration and Education* (Ill.-1952), 105 N.E. 2d 758, wherein the Supreme Court of Illinois upheld an act of the Illinois Legislature regulating and restricting adver-

tising in the field of optometry in the interest of public health and welfare. The Supreme Court of Massachusetts in *Commonwealth* v. *Ferris* (Mass.-1940), 25 N.E. 2d 378, which involved the constitutionality of the Massachusetts law prohibiting advertising in the field of visual care, said regarding such laws:

> "They may be sustained as measures in the interest of the public health, an unquestioned ground for the exercise of the police power."

And this opinion further states:

> "There may well be reasons of public policy requiring the prohibition of advertising to sell merchandise, the actual sale of which is not forbidden."

In the case of *City of Springfield* v. *Hurst*, *supra*, the Ohio Supreme Court very wisely and very correctly stated:

> "Poor and improperly ground lenses will impair the eyesight of the person to whom they are sold as properly fitted. Thus, legislation prohibiting such bait advertising has a real and substantial relationship to the public health whatever vendor employs the injurious method. The result of forbidding the professional practitioner to resort to such advertising and permitting the optician (or even the retail vendor) to indulge in the harmful practice does not eradicate the evil. The whole field must be covered if protection is to be afforded the public."

With reference to Section 4 of House Bill 953, the plaintiffs admit that the Oklahoma Legislature has the right to ban the corporate practice of ophthalmology and optometry. In *Neill, et al.* v. *Gimbel Bros., Inc.* (Pa.-1938), 199 A. 178, the Supreme Court of Pennsylvania stated:

> "The Legislature has the right to forbid, as contrary to public policy, the practice of a profession by a corporation through duly licensed professional men hired

by the corporation, since public policy is properly concerned with the maintenance of high professional standards."

That portion of Section 4, House Bill 953 held unconstitutional and void by the majority opinion of the three-judge Federal District Court, is a regulation by the Oklahoma Legislature of the practice of ophthalmology and optometry in the State of Oklahoma. That the State Legislature can fully regulate the practice of professions within its borders should not be subject to question. The opinion in the recent case of *Sears Roebuck & Co., et al.* v. *State Board of Optometry* (Miss.-1952), 57 So. 2d 726, furnishes a very clear picture of the evils of corporate practice and the shams and devices used in many states to cover up and hide violations of state bans against corporate practice. A reading of this case will clearly show the need for all of the provisions of Section 4, House Bill 953, to properly and adequately protect the public against the commercial practice of the professions responsible for the visual care of the public.

The judgment and decision of the District Court in declaring said portions of Sections 2, 3 and 4 of House Bill 953, passed by the Oklahoma Legislature, to be unconstitutional and void as having no real relation to the public health and welfare and without the police power of the State of Oklahoma, is completely repugnant to the controlling decisions of the United States Supreme Court and other high courts of the land.

The Legislature of Oklahoma has seen fit under its police power to fix professional responsibility for the visual care of its citizens, to prohibit the advertising of the sale of eyeglasses, frames, etc., to prohibit rebates between opticians and doctors, to prohibit solicitation of business for doctors, to prohibit corporate practice of ophthalmology

and optometry, and in furtherance thereof prevent the subleasing of departments or renting of space in retail merchandising establishments to ophthalmologists and optometrists for the examination of eyes for glasses. Conditions had arisen in Oklahoma making such legislation urgently necessary to protect the public from unscrupulous practices such as those of these plaintiffs whose methods of doing business are well set out in the dissenting opinion of Circuit Judge Murrah.

In this connection it will be noted that this action was filed by the plaintiffs, Lee Optical of Oklahoma, Inc., and Ellis Carp, dba Douglas Optical of Tulsa, Oklahoma, which companies are owned and operated by said Ellis Carp of Dallas, Texas, who also owns and operates 35 optical companies in Texas and a supply house (DalTex Company) in Dallas, which grinds lenses for all of said companies, and by the plaintiff, Oran Rips, M.D., who has an office leased from and in the place of business of the defendant, Zales Jewelry Company in Tulsa (in which Douglas Optical also has a place of business), who testified that his said office lease was "worth to me $25,000."

The defendants—appellants strongly contend that House Bill 953 and all its provisions constitute a valid police power enactment by the State of Oklahoma in connection with a matter having a most vital effect on the public health and welfare. If the judgment and decision is permitted to stand, the evils the Legislature of Oklahoma saw fit to correct in the interest of the public health and welfare will not only continue unabated but will multiply with time until the great mass of the people of Oklahoma will, by a program of advertising and secret corporate practices, cease to receive professional eye care and will be com-

pletely in the hands of commercial, non-professional interests solely concerned in making money.

In this connection it is clear that if plaintiffs' plan of business is legal, they can, acting in conjunction with some licensed optometrist or ophthalmologist and by the use of an extensive and alluring advertising program, practically corner the professions of optometry and ophthalmology in the city or territory where they advertise, since licensed optometrists or ophthalmologists cannot engage in a counter advertising program. The logical, final effect of such a plan of business is either to destroy the professions of optometrists or ophthalmologists or to make them subservient to advertising optical laboratories or companies; that is, either to make licensed optometrists and ophthalmologists the employees of advertising optical laboratories or companies or dependent for their livelihood upon such customers they may choose to send to them.

The opinion of the three-judge court herein, and the judgment based thereon, are in direct conflict with the basic principles announced by the Supreme Court of the United States in the cases of *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U.S. 177, 82 L. ed. 734, and *Hanks et al.* v. *Hamill et al.*, 288 U.S. 52, 77 L. ed. 610, wherein the court (in *South Carolina State Highway Department* v. *Barnwell*) said:

> "When the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision * * *. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the States because it

affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. * * *

"Being a legislative judgment it is presumed to be supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination, we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis; * * *"

and (in *Hawks et al.* v. *Hamill et al.*) said:

"Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to issue 'unless in a case reasonably free from doubt.' * * *

"Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting colore officii in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. * * *"

The case of the plaintiffs-appellees and the opinion and judgment of the three-judge district court herein are based entirely upon the proposition that certain provisions of a state law are violative of the federal constitution and that, for that reason and for that reason alone, the defendant

state officials should be permanently enjoined from enforcing or attempting to enforce such provisions.

Respectfully submitted,

MAC Q. WILLIAMSON,
Attorney General of Oklahoma,
FRED HANSEN,
First Assistant Attorney General,
JAMES C. HARKIN,
Assistant Attorney General,
Counsel for Appellants.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6002—Civil

LEE OPTICAL OF OKLAHOMA, INC., a Corporation; ELLIS CARP, dba Douglas Optical; and ORAN RIPS,
Plaintiffs,

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANDVILLE SCANDLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma; et al.,
Defendants

Before Murrah, Circuit Judge, and Vaught and Wallace, District Judges

WALLACE, *District Judge:*

(Chief Judge Vaught concurring.)

OPINION—Filed March 1st, 1954

The plaintiffs bring this action under the Federal Declaratory Judgment Act [1] and challenge the constitutionality of certain provisions found in the recent Oklahoma Enactment dealing with the regulation of "visual care".[2] The statute subject to attack is commonly referred to as Enrolled House Bill No. 953 and is entitled:

> "An Act relating to visual care; Defining terms; prohibiting dishonest and dangerous practices in the sale of optical goods and devices; prohibiting discrimination; making the Act cumulative to other laws; making

[1] 28 U. S. C. A. §§ 2201, 20. In addition, plaintiffs request an injunction against enforcement of this State statute; this necessitates the three-judge court provided for in § 2281.

[2] 59 Okla. St. Ann. §§ 941-947 (1951).

violation a misdemeanor authorizing injunction against violators."

Plaintiffs, Carp, an individual, and Lee Optical Company, an Oklahoma corporation, are "dispensing opticians";[3] the other plaintiff, Rips, is an ophthalmologist, duly licensed to practice in Oklahoma, who offices in Tulsa, Oklahoma, in space rented from the Zales Jewelry Company. Plain-

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[3] The dispensing optician is both a craftsman and a merchant. He maintains a complete stock of frames from which the customers may make selections; these frames vary in size, shape, color and adornment. In order to fit the frames (and completed eye-glasses) to the customer's face he must have some artisan skill related to the science of optics and must have some knowledge of optical terms. As observed by A. D. Hill, a member of the National Guild of Prescription Opticians, and a Master in Ophthalmic Optics, a dispensing optician, in response to a question on just what his duties included: "A. I receive ophthalmic prescriptions from the ophthalmologists, and in very rare instances optometrists do the technical work which involves measuring the distance between the pupils, commonly known as P. D., aiding in the selection of a frame, and of course in many cases it is a matter of styling with women, and some men are a little bit particular about what type of frame they wear; so actually it's a combination of technical work plus merchandising." (Tr. 77)

In addition to the dispensing optician the field of visual care has three other definable divisions. (1) The ophthalmologist, a duly licensed medical doctor who specializes in the care of the eyes; (2) The optometrist, a quasi-professional who is trained to examine the eyes for refractive error, and at the same time recognize but not treat diseases of the eye, and who acts also as craftsman and merchant in filling prescriptions for eyeglasses; (3) The optician (or optical supplier) who is a skilled artisan qualified to actually grind lenses and perform other tasks which the dispensing optician may not be equipped to perform.

tiffs Carp and Lee Optical direct their constitutional criticisms at parts of sections 2 and 3 of the instant Act;[4] plaintiff, Dr. Rips, questions a portion of section 4.[5]

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[4] Section 2 states: "It shall be unlawful for any person, firm, corporation, company, or partnership * * * (not an Oklahoma licensed ophthalmologist or optometrist) to fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or to attempt to duplicate, or to place or replace into the frames any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that * * * (an Oklahoma licensed ophthalmologist or optometrist) may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses."

Section 3 provides: "It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasess, lenses, frames, mountings, prisms, or other optical appliances for visual correction. Provided, however, that the provisions of this Act shall not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor of said commodity or material; nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sun-glasses equipped with plano lenses nor industrial glasses or goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser."

[5] Section 4 provides: "It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examina-

It is recognized, without citation of authority, that all legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not by decision invalidate an enactment merely because in the court's opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. A court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory.[6]

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tion or visual correction to receive or accept any rebate, kick-back, reward or premium from any optical company or any other person, firm, or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any * * * (Oklahoma licensed ophthalmologist or optometrist). It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization, group or lay person and it shall be likewise unlawful for any corporation, lay body, organization group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of * * * (an Oklahoma licensed opthalmologist or optometrist) provided that this sentence shall not apply to the University of Oklahoma School of Medicine and Hospitals, or to a bona fide resident physician of a licensed hospital. *No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting* to do eye examination or visual care to occupy space in *such retail store.* Nothing in this Section shall prohibit * * * (an Oklahoma licensed ophthalmologist or optometrist) from organizing or maintaining a professional association with other persons so licensed." (Constitutional objection raised to portion emphasized)

[6] As phrased in the Court's syllabus in *Adwon* v. *Oklahoma Retail Grocers Ass'n., Inc.* (1951) 204 Okla. 199, 228 P. 2d 376, 377: "The Legislature is itself the judge of the conditions which warrant legislative enactments, and they are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary, capricious, and unreason-

The Attorney General, in urging the validity of the Act in question, emphasizes that the general purpose and intent of the Act, as evidenced by the title's broad scope, is to make certain that the people of Oklahoma receive the best possible visual care;[7] and, argues that to achieve such a goal it is imperative that the entire field of visual care (or responsibility therefor) be under the direct supervision and administration of professional practitioners (either physicians or optometrists) with all non-licensed artisans and commercial interests prohibited from activity except pursuant to professional written prescriptive authority.

Unquestionably, many aspects of the field of visual care are of sufficient public interest to warrant the operation of police power authority, and many regulatory measures directed toward protecting the public in regard to eye care have been judicially sanctioned.[8] However, the manner and extent to which the definable segments which compose the entire field of visual care can be controlled, like all other

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able, and hence irreconcilable with the conception of due process of law."

As observed by Mr. Justice Burton in the recent case of *Salsburg* v. *State of Maryland* (No. 38.—October Term, 1953, p. 8, fn. 9): "'. . . It is . . . a maximum of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power.' Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 104. 'A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.' Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 584. See also, Middleton v. Texas Power & Light Co., 249 U. S. 152, 157-158; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78-79."

[7] This distinguishes the instant case from *Palmer* v. *Smith* (1948) 229 N. C. 612, 51 S. E. 2d 8 and *Kindy Opticians, Inc.* v. *Michigan State Board of Examiners* (1939) 291 Mich. 152, 289 N. W. 112, inasmuch as the primary issue before those courts was whether certain artisan practices constitued a practice of optometry.

[8] See, for example, *Roschen* v. *Ward, Attorney General of the State of New York* (1929) 279 U. S. 337, — S. Ct. —; *Commonwealth* v. *Kresge Company* (1929) — Mass. —, 166 N. E. 558; *Ritholz* v. *Commonwealth* (1954) — Va. —, 35 S. E. 2d 210.

objects of legislative regulation, is limited by that line wherein to cross-over is to step into the area of arbitrariness, unreasonableness and lack of rationality between the proposed control and the actual welfare of the public. Significantly, the "field of visual care", in its broadest aspect, occupies a rather unique position. The services rendered therein include those exclusively professional, those quasi-professional, those artisan and those strictly mercantile in character; and, each of these services has evolved into separate and distinct class of private endeavor.[9]

Although, the artisan, the merchant, as well as the professional may be regulated in any field where the regulated efforts bear directly upon the public health and welfare,[10] none can be restricted where the particular acts regulated do not involve matters of public interest; and, where a general field of endeavor is specifically composed of definable activities, some of which pertain to public health and welfare and others of which do not, the non-related activities cannot be regulated merely because of proximity of position. Control must cease when we pass from matters touch-

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[9] The original of the ophthalmologist, the pure professional, is identical to that of other medical doctors, or physicians; however, he has specialized in eye care. The optometrist, the quasi-professional, evolved from an artisan-merchant beginning to the place where certain professional training and experience has qualified him to examine eyes for refraction and recognize although not treat disease of the eye; in addition, he has retained the artisan-merchant characteristic and continues to fill prescriptions and market the completed spectacles. The optician (whether a dispensing optician or an optical supplier) continues as a skilled artisan and a merchant who sells both services and goods.

[10] The test is not whether the service is professional, artisan or merchant, but whether the services rendered and merchandise sold directly relate to the public health and welfare. However, historically, there has been considerable correlation between the education and experience required to qualify a person for specific tasks, and the importance such tasks carry with regard to the public good. Thus, the true or learned professions, almost without exception, have been subjected to statutory regulation for the public's protection; and, where certain crafts and businesses which have existed for a considerable length of time and operated entirely free from regulation are prohibited or severely restricted the public necessity for such legislative control must be definite and not merely fanciful.

ing public welfare into matters historically mercantile and not rationally related to the public good; and, even where the public welfare is involved, the effect of the statute must bear a reasonable relation to the purpose to be accomplished [11] and must not discriminate between two similarly circumstanced groups, regulating one group but exempting the other.[12]

Clearly, that phase of vi ual care which deals with the actual examination of the eyes (whether for pathology or refraction) [13] together with promotional advertising which brings direct mercantile pressure upon the public to submit to examinations and to purchase spectacles, is subject to legislative control.[14] Although the evidence in the instant case indicates that no permanent injury to the eye can result from eyeglasses which concededly are misfitted,[15] the importance of accurate sight and seeing comfort (that is, a freedom from nervousness and other minor irritations

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[11] *Liggett Company* v. *Baldridge* (1928) 278 U. S. 105, 111, 49 S. Ct. 57; *Lawton* v. *Steele* (1893) 153 U. S. 133, 137, 14 S. Ct. 499.

[12] *Royster Guana Company* v. *Virginia* (1920) 253 U. S. 412, — S. Ct. —; *Coalgate* v. *Harvey* (1935) 296 U. S. 404, 422, 423, — S. Ct. —; *Old Dearborn Company* v. *Seagram Corporation* (1936) 299 U. S. 183, 197, — S. Ct. —. Also, see *People* v. *Weiner* (1915) 271 Ill. 74, 110 N. E. 870.

[13] "* * * In furtherance of its general purpose and to carry out the details of its plan of regulation, the Legislature could properly vest the board (of examiners) with power to make regulations reasonably adapted to assure the competency of optometrists and to prevent conduct on their part which would tend to do harm to the public. (citing cases)". *Sage-Allen Co.* v. *Wheeler* (1935) —Conn. —, 179 Atl. 195, 200.

[14] *State of Louisiana* v. *Rones* (1952) — La. —, 67 So. 2d 99; *Ritholz* v. *Commonwealth* (1945) — Va. —, 35 S. E. 2d 210; *Commonwealth* v. *Ferris* (1940) — Mass. —, 25 N. E. 2d 378.

[15] As mentioned by Dr. Tullos O. Coston, eminent ophthalmologist: "Q. In that connection, Doctor, if a person has a refractive error in his eye, and doesn't obtain glasses, is his eye going to be damaged or injured in any way? A. There will be no change in the anatomical structure of the eye, there will be no damage whatever whether he wears proper glasses or does not." (Tr. 38, 39)

"I think you would have a very difficult time in demonstrating that any person is definitely damaged by being supplied with glasses that are not perfect correction of his refractive error." (Dr. Benedict, dep. p. 41)

which can result from ill-fitted spectacles) brings this segment of visual care squarely within the sphere of police power authority. Unquestionably, the general health and welfare could suffer as a result of promiscuous and indiscriminate fittings of eyeglasses by persons unqualified to examine the eyes, particularly where the examiners were not qualified to recognize, even if not treat, various diseases of the eye; and, in a more limited sense the health and welfare would be adversely affected if en masse the people wore improperly refracted eye glasses which impaired the over-all seeing ability and comfort of the spectacle wearing public.

Although much of the Act under consideration constitutes a legitimate exercise of the legislative police power, this Court, *without impliedly sanctioning all other portions of this Act*, is of the opinion that this legislation in impact is unconstitutional at the following three points:

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Those portions of section 2, which make it unlawful for any person not a licensed optometrist or ophthalmologist, "To fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.

The unambiguous language of section 2 makes it unlawful, among other things, for either a dispensing or laboratory optician to take old lenses and place them in new frames and then fit the completed spectacles to the *face* of the eyeglass wearer except upon written prescription from a qualified eye examiner. Obviously, this serves to prohibit the wearers of eyeglasses from exchanging their frames either to obtain more modern designs or because the former frames are broken, without first visiting an ophthalmologist or

optometrist; and, which in turn diverts from the optician a very substantial, as well as profitable, part of his business.[16]

The evidence indicates, almost without variance, that written prescriptions issued by the professional examiner contain no directive data in regard to the manner in which the spectacles are to be fitted to the face of the wearer. In addition, the Court is satisfied that the mere fitting of frames to the face, where the old lenses are available, is in reality only an incident to what fundamentally is a merchandising transaction, that is, the sale of a pair of frames; and, in any event, the knowledge necessary to perform these services is strictly artisan in character and can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist.

Although, as emphasized previously, the legislature can regulate the artisan, the merchant, or the professional where the regulated services embrace issues of public health and welfare, the services under consideration bear no real or rational relation to the actual vision of the public. Prospective wearers of eyeglasses are not affected inasmuch as a person seeking this particular service must already possess a pair of eyeglasses; and, *present* wearers of eyeglasses are not imperiled inasmuch as such wearers have previously submitted to examinations by professional men at the time the original pairs of spectacles were obtained.

It is most important to note that the flexibility of the human eye, with particular emphasis on the service now being discussed, is such as to assure the eyeglass wearing public of good vision even where succeeding frames when fitted to the face are not always fitted in the same manner. Dr. Tullos O. Coston, in testifying in regard to the actual

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[16] As demonstrated by the evidence the dispensing optician has two things to sell, lenses and frames. If prospective purchasers of frames are required to go to an ophthalmologist or optometrist to get an ophthalmic prescription, inasmuch as the optometrist fills all of his own prescriptions (and actually sells between 60-70% of the eyeglasses sold) the inevitable effect will be to deprive the optician of a sizeable amount of trade.

refraction of the eye, accented the liberality which prevails in connection with visual correction:[17]

> "* * * What we aim to do in a refraction, I think that sometimes we get mixed up in technical things too much. The aim of proper refraction is first of all to have the best vision that the glasses will give the patient, plus comfort. Now if the glasses are fitted improperly, and a number of times that will be true, because the patient subjectively didn't give you the proper answers, or maybe the doctor was a little careless that morning, but if he gets the glasses and he sees well, and has no discomfort, suppose that a mistake had been made somewhere, it is of no importance. You fit the patient with glasses to make him see the best you can, with comfort. *Now technically whether you've got it on this axis or that axis is of absolutely no importance*, and you find people wearing the screwiest type of glasses, that when you get through examining them, your reading and your interpretation of what they need is exactly different to what they have worn, but they have been quite comfortable and they have seen well with what they have had.
>
> "Now you have two choices. You can let them wear what they have, or you can give them a new pair of glasses, and very often we let them wear what they have had, if financial matters enter into it. *You can't say that the eye is like a piston in a cylinder, you don't have it fit it to that tolerance.* (Emphasis supplied.)

If such be true in regard to the actual examination of the eyes for refraction, even more so such must be true in regard to the mere placing of original lenses in new frames and placing the frames to the face of the wearer. The legislature cannot control these specific functions, and in effect deprive opticians of their right to freely pursue a lawful calling, under the guise that such control is reasonably and rationally related to the health and welfare of the people.

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[17] (Tr. 71-72)

The effect of section 2 which prohibits the duplication of existing lenses (that is, the preparation of a completely new set of spectacles) without a *written* prescription is also unconstitutional.

The evidence establishes beyond controversy that a skilled artisan (such as an optician) can accurately ascertain the power of a lense, or fragment thereof, without the aid of a written prescription, and can thus duplicate or reproduce the original pair of spectacles without adversely affecting the visual ability of the eyeglass wearing public. This process requires no unusual professional judgment, peculiar to the licensed professions of ophthalmology and optometry but is strictly artisan in character. The power of the originally prescribed lense, or fragment thereof, can be learned by the use of a mechanical device known as the lensometer; this device (whether being operated by a professional or layman) scientifically measures the power of the existing lense and reduces it to prescriptive terms.[18-19]

Obviously, the accuracy of the lensometer operation is only commensurate to the care and skill exercised by the operator; and, logically, the vision of eyeglass wearers could be impaired somewhat by a careless commercial usage of this machine resulting in the mass production of lenses which were not accurate duplications of the original prescriptions.

Although on this precise issue of duplication, the legislature in the instant regulation was dealing with a matter of public interest, the particular means chosen are neither reasonably necessary nor reasonably related to the end sought to be achieved. As observed in the classic case of *Lawton* v. *Steele:*

> "* * * To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as dis-

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[18-19] Significantly, the court in *Palmer* v. *Smith* (1948) 229 N. C. 612, 51 S. E. 2d 8, 11, concluded from the evidence there adduced: "It is undisputed on the record that a qualified optician can take a whole or broken lense and by use of a vertometer or lensometer, duplicate such lense with accuracy and exactness. The process of duplication is conceded to be a purely mechanical one."

> tinguished from those of a particular class, require such interference; and, second, that *the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.* (Emphasis supplied.)

It is absolutely unnecessary to delegate to professional men the control of and responsibility for the just-mentioned artisan tasks, where the opticians, as a group possess adequate skill to fully protect the vision of the public in accurately duplicating existing lenses. The operation of the lensometer does not rise to the need or dignity of exclusive professional supervision. A qualified witness demonstrated and testified that any reasonably intelligent person can be taught to operate the lensometer and become qualified to accurately learn the power of existing lenses, or fragments thereof, within several hours. As further demonstrated by the evidence, the opticians as a class, have for a number of years used the lensometer in their trade and the optometrists and ophthalmologist use this same device when wishing to check the power of lenses; and, although only a minority of licensed opthalmologists require a patient to return to the examiner's office to check the accuracy with which the original prescription has been filled, even in such instances the lensometer is not operated by the physician but by a clerk in the office.

The legislature has been guilty of undue oppression in failing to set up qualifying standards for the opticians, if such standards be necessary for the public protection, and at the same time arbitrarily legislating many of the skilled artisans out of a long recognized trade, by delegating the sole control of their skills and business to a professional group,[2] when the public can be completely protected with-

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[2] The effect of section 2 is to place within the exclusive control of optometrists and opthalmologists the power to choose just what individual opticians will be permitted to pursue their calling inasmuch as where the professional men must first give a written prescription and then "remain responsible for the full effect of the appliances so furnished by such other person" the ophthalmologists will pointedly refer their business to a limited number of channels, thus den[illegible]ng all other opticians the opportunity to follow their trade regardless how competently the remaining opticians are

out taking from the optician this valuable property right.[21]

Also, on this specific point under consideration, the legislature did not act in accordance with the requirement pronounced by Mr. Justice Sutherland in *Liggett Company* v. *Baldridge*:[22]

> "The act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called

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qualified. As shown by Dr. Coston's testimony: "Q. Doctor, I will ask you if under the law of Oklahoma, you are held liable for the glasses dispensed pursuant to a prescription of yours, will you issue prescriptions and permit them to be taken to any optician that patient might choose? A. No Q. What will you do if that is the situation, assuming what I have said is the law? A. Patient will be directed to an optician I know to be reputable and reliable." (Tr. 51) Obviously, the optometrists will refer little if any business to the opticians inasmuch as they are competitors.

[21] If the function of the optician is such as to require licensing, the legislature can proceed to establish standards which must be met before an optician can be registered and forbid the practice of opticianary by non-registered opticians, just as has been provided in regard to pharmacists. (See 59 Okla. St. An. 331, et seq.) The action by the legislature in the instant act is as unreasonable as if pharmacists were divested of their right to do business by legislative action which delegated to physicians the absolute control and responsibility for accurate *compounding* of medical prescriptions for the reason that a physician alone is qualified to *prescribe drugs for patients.*

Obviously, the opticians do not possess qualifications which would enable them to become licensed ophthalmologists or optometrists. As observed in *Smith* v. *Texas* (1914) 233 U. S. 630, 638; "* * * in the exercise of the police power the State may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employe. None of the cases sustains the proposition that under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special and favored position. *Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.*" (emphasis supplied) *Cf. People* v. *Brown* (1950) 407 Ill. 565, 95 N. E. 2d 888.

[22] Fn. 11, *supra.*

upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary invasion of appellant's property rights guaranteed by the Constitution."

The means chosen by the legislature does not bear "a real and substantial relation" to the end sought, that is, better vision, inasmuch as although admittedly the professional eye examiners are specially trained in regard to eye examination, they possess no knowledge or skill superior to a qualified practicing optician insofar as the artisan tasks in view are concerned, and in fact the two professional groups, as a class, are not as well qualified as opticians as a class to either supervise or perform the services here regulated.

In addition, and of even more significance, is the fact that section 3 exempts from regulation all sellers of ready-to-wear glasses,[23] even though such sellers, from the viewpoint of public health and welfare, lie within the identical class and circumstance occupied by "fitters and sellers of frames" and "duplicators of lenses and entire spectacles."

The rule is clear that where the police power is ushered into play it must be exercised in an undiscriminating manner in relation to all persons falling within the same class or circumstance. This principle was enunciated in *Royster Guano Company* v. *Virginia* wherein the Court said:[24]

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. *But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.* * * *" (Emphasis supplied.)

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[23] See Fn. 4, *supra*.

[24] Fn. 12, *supra*, at 415.

In the instant legislation not only is the "relation to the object of the legislation" questionable (as previously discussed) but "all persons similarly circumstanced" pointedly have not been treated alike. Persons who sell frames (incidentally adapting and fitting the completed spectacles to the face), persons who duplicate original eyeglasses and market the duplicated spectacles, and persons who sell ready-to-wear glasses are identically situated; that is, all are sellers of merchandise which is not immediately connected with or supervised by a professional eye examiner. Yet the public health and welfare is touched in the same manner and degree by each of these groups inasmuch as the possible result is exactly the same; people may wear spectacles which are not best suited for their eyes.

The legislature must not blow both hot and cold! If it be desirable for the public protection that opticians sell merchandise and service only upon written prescriptive authority, the legislature cannot at the same time permit the unsupervised sale of ready-to-wear (convex spherical lenses) eyeglasses. The mere fact the public selects at will from the counter serves as no basis for distinction: if such constitutes a distinction then the public should have the equal right to purchase new frames or duplicate prescription eyeglasses at will.

In reality, the unrestricted sale of ready-to-wear eyeglasses doubtless is more perilous than the practices prohibited by section 2. It is certain that the customer purchasing new frames, or duplicate lenses and frames, has at some time been to a qualified eye examiner, one qualified not only to refract the eyes but qualified also to recognize diseases of the eye; whereas, the purchaser of ready to wear eyeglasses has not even been provided with the safeguard of an initial examination.

An example of unlawful discrimination between business groups similarly situated but wherein the legislature artificially attempted to place the businesses in two different classes is found in the case of *People* v. *Weiner*, wherein the court in dealing with a statute which forbade the use of secondhand material in the making of mattresses (for

sanitary reasons) but placed no such restriction in regard to the making of pillows, held that the attempted classification was arbitrary and unreasonable and in doing so said:[25]

> "Counsel * * * argue that there is a discrimination between the manufacturers and dealers in pillows and manufacturers and dealers in mattresses, comforters, and quilts, especially after they have been used, as there is no provision made as to pillows; that, so far as this act is concerned, material made second-hand in the same way as the material in the mattresses may again be made into pillows and sold without any regulation whatever. Under the decisions of this state this is class legislation (citing authorities). The provisions of sections 1 and 2 of the act are arbitrary and unreasonable, and must be held unconstitutional and void."

Inasmuch as there is no real difference between ready-to-wear spectacles and prescription eyeglasses, insofar as the public's need for properly fitted eyeglasses is concerned, to regulate prescription eyeglasses, as done in section 2, and yet expressly exempt ready-to-wear eyeglasses constitutes an unreasonable and discriminatory classification in contravention to the equal protection clause of the Fourteenth Amendment.

II

That portion of section 3 which makes it unlawful "to solicit the sale of * * * frames, mountings * * * or any other optical appliances."

As mentioned previously, the Legislature has the authority to regulate and control "bait advertising", that is, advertising which not only tends to persuade the public to submit to eye examinations but also tends to result in the purchase of completed pairs of spectacles.[26] Clearly, it is

[25] Fn. 12, *supra*, at 873, 874.

[26] Fn. 14, *supra*. In approving that line of authority which holds that the legislature has power to regulate advertising by retail dealers of eyeglasses, the Court in the very recent case of *State of Louisiana* v. *Rowe*, fn. 14, *supra*, at 105, commented: "* * * These courts have decided that

against the best interest of the public to have the number of eyeglasses worn determined by mercantile practices rather than the actual visual need of the people. Where advertising, which when uncontrolled, encourages such a condition the right of the legislature to supervise this segment of the field of visual care is identical with the legislature's right to supervise the fields of medicine and dentistry.[27]

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the statutes are a reasonable exercise of the policy power because they prevent 'bait advertising' which attracts the unwary to purchase inferior glasses; eliminate the temptation to, and the pressure upon, customers that result from the assurance that no more than a named price will be charged; protect an uncautious and unwary public from being misled and deceived; prevent the increase in sales and the incidental harm that come from unfitted eyeglasses; eliminate to some extent poor quality and poor workmanship which naturally result from the desire to sell spectacles in quantity at a low advertised price for the purpose of underselling competitors."

Advertising which tends to mislead the public into thinking the advertiser is qualified to practice professionally is likewise subject to regulation. See *Curtis* v. *Registered Dentists of Oklahoma* (1943) 193 Okla. 233, 143 P. 2d 427 wherein at 429, the Court said: "* * * we are of the opinion that it is apparent that it was the intention of the Legislature to protect the public from any person who might undertake to engage in the practice of dentistry without license to do so, and that part of its purpose was to prevent anyone other than licensed dentists supplying artificial substitutes for natural teeth to the persons who would use them. An examination of the stipulation of facts discloses that defendant, who had no license to practice dentistry, was engaged in the business of supplying substitutes for natural teeth to the public at large through advertisements in the newspapers and the telephone directory which patently were designed to induce the public to believe that the defendant was authorized to engage in the practice of dentistry by supplying artificial substitutes for natural teeth."

[27] As mentioned in *Semler* v. *Oregon State Board of Dental Examiners* (1935) 294 U. S. 608, 612, 55 S. Ct. 570: "The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' The Legislature was aiming at * * * bait advertising. 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed dental work" was, as a general rule, the practice of the charlatan and the quack to entice the public. * * * "

Thus, any statute which regulates advertising in regard to eye examinations (that is, for eye diseases and for refraction, by one qualified to recognize, if not treat, diseases of the eye) or other advertising which promotes the sale of complete eyeglasses (particularly the original pair) [28] upon mere merchandising principles rather than in regard to the actual visual need, can be deemed rationally related to the public health and welfare. However, where a statute, such as the provision under consideration, intrudes into a mercantile field only casually related to the visual care of the public and restricts an activity which in no way can detrimentally affect the people, such an intrusion is unconstitutional.[29]

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[28] This parenthetical observation is made because the Court believes that the primary basis of the legislative authority is the fact that the public should not be induced to become eyeglass wearers under the same conditions they are induced to purchase ordinary mercantile commodities. Once a person has been properly examined and has become a spectacle wearer, advertising in regard to even a completed set of eyeglasses presents very little evil as to him although it may still be of public interest to control advertising, with accompanying competitive practices, which may result in the production of inferior optical merchandise and service.

[29] The effect of the instant statute, which even prohibits the display of frames in a show window, must be sharply distinguished from *Commonwealth* v. *Kresge Co.* (1929) — Mas. —, 166 N. E. 558, 560, 561, wherein the court said: "It seems to us that the statute here in question conforms to every requirement for validity thus laid down and is not obnoxious to any one of them. The defendant is undertaking to invade under the guise of private mercantile business a field rightly sequestered, by the Legislature in the interests of the public health (that is, the fitting to the eyes and sale of completed ready-to-wear spectacles) to those possessing special skill and training in a specified department of treatment of human ills."

In addition, although the field of visual care has been the object of *regulation* in regard *to advertising* (see fn. 14, *supra*) this Court knows of no instance where a legislature has utterly *prohibited* all forms of advertising, except the Louisiana Legislature. (See L. S. A.-R. S. 37:1041 *et seq.*) Significantly, the Louisiana Supreme Court in the *Rones* case, fn. 14, *supra*, at 106, although ruling that § 1063(9) of the Louisiana Act which prohibited any retailer from advertising optometric services or spectacles "as free or for a price," was constitutional, the Court by way of dictum remarked that as to § 1065 (the section completely prohibiting advertising of any form) "a plea of unconstitutionality might have merit." Distinguish the instant legislation from the issue in *City of Springfield* v. *Hurst* (1944) — Ohio —, 56 N. E. 2d 185, 189 wherein a city ordinance

Naturally, where a commodity being sold is so closely associated with the administration of medical treatment to a patient that the commodity itself becomes a mere incident to and actually a part of the medical treatment being rendered, becoming part and parcel of the professional judgment being exercised on behalf of the patient, then the commodity is subject to complete control and regulation; as observed by Mr. Chief Justice Hughes in *Semler* v. *Oregon State Board of Dental Examiners*[30] such a condition exists in dentistry:

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the market place."

However, this Court discerns utterly *no analogy* between the danger inherent in uncontrolled dental advertising, and advertising by dispensing opticians, or others, of various styles of frames, mountings and other modern and improved optical appliances, where such advertising omits the promotion and display of lenses or complete eyeglasses and makes no reference to eye examinations. Publicity limited strictly to frames can be deemed nothing more than straight merchandising inasmuch as it has no real relation to the vision of the public and should only be subject to those limitations recognized generally in regard to ethical mercantile advertising.

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was held constitutional which forbade "advertisment by newspaper, radio, display, or otherwise, *any statement advertising the price of lenses, or of complete* eyeglasses, including lenses, either with or without professional services or credit terms, installment payments or price plans, or the price of any frames, or mountings, *unless in conjunction therewith the words, 'without lenses' appear in such manner to be clearly discernible, or read in such manner as to be clearly understood.*" (emphasis supplied); and, likewise distinguish *Klein* v. *Department of Registration and Education* (1952) — Ill. —, 105 N. E. 2d 758 which had to do with the restricting of certain kinds of advertising by optometrists.

[30] Fn. 27, *supra*, at 612.

Inasmuch as a large majority of the eyeglass wearing public have more than one set of eyeglasses they are, from time to time in the market for new frames, not only to replace broken ones but to acquire those more modern in appearance as the frame has become an integral part of the present-day cosmetology. Advertising directed exclusively at this feature of eye wear can have no deleterious effect on the public, inasmuch as it has no influence on the *prospective* wearer of eyeglasses, and to the *present* wearer (a person already examined by a licensed professional) is but a mere piece of merchandise.

The dispensing optician, a merchant in this particular, cannot arbitrarily be divested of a substantial portion of his business upon the pretext that such a deprivation is rationally related to the public health.

III

That portion of section 4 which provides that: "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store".

Unquestionably the legislature has the authority to prohibit corporations from practicing Ophthalmology and Optometry in Oklahoma; and, insofar as section 4 moves inferentially toward such a goal, the legislature has acted within its authority.[31] As stated in *Sears Roebuck & Company, et al.* v. *State Board of Optometry*,[32]

> "In the clear and comprehensive opinion the chancellor examined the statutes, and said in part as follows: 'The weight of modern authority is against such arrangements as we have here (i.e. corporate practice in the field of optometry), and the question presented is whether the optometrist is working for the defend-

[31] See fn. 5, *supra*.

[32] — Miss. —, 57 So. 2d 726, 730 (1952).

ant companies as an employee, or for himself as a licensed and independent practitioner.

"'*It is only in the latter capacity that his status could be legal and his license authoritative in professional relation and service to the public.*'" (Emphasis supplied.)

And as recognized in *Neill et al.* v. *Gimbel Bros., Inc.*:[33]

"* * * We cannot pronounce arbitrary or irrational the placing of optometry on a professional basis. This conclusion finds support in other jurisdictions. (citing cases)

* * * * * * *

"* * * The legislature has the right to forbid such practice as contrary to public policy, which is properly concerned with the maintenance of high professional standards. *One who practices a profession is apt to have less regard for professional ethics and to be less amenable to regulations for their enforcement when he has no contractual obligations to the client, does not fix or receive the fees, and is under the control of an employer whose commercial interest is in the volume of sales of merchandise effected by the prescriptions of the employee-practitioner.*" (Emphasis supplied)

However, to forbid the renting or sub leasing of quarters from retail merchants in order to enforce the legislative prohibition against corporate practice constitutes an arbitrary interference with the right of contract.

Concededly, as some of the cases illustrate, corporate practice has taken place where corporations sublease space to professional eye examiners. However, the correlation between the evil sought to be prevented and the one circumstance singled out and prohibited is not sufficient to an-

[33] 330 Pa. 213, 199 Atl. 178, 182 (1938).

thorize such a police power regulation. As mentioned in *Treigle* v. *Acme Homestead Association:* [34]

> "* * * Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

And as observed in *Indiana ex rel. Anderson* v. *Brand:* [35]

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end * * *"

We believe the means chosen in this particular instance is "arbitrary and oppressive" and not reasonably adapted to the accomplishment of the end sought, that is, the abolition of corporate practice in the professions of ophthalmology and optometry. As evidenced in the *Sears Roebuck & Company* case, *supra*, even though a leasing arrangement can be used to attempt to evade a corporate practice prohibition, nonetheless, the fact of statutory violation can be established by competent proof of the kind and character used to prove any other statutory breach.

Whether a professional man indulges in corporate practice, in violation of a statutory prohibition, is a matter of his individual integrity rather than his geographic location.

The instant prohibition is just as unreasonable as if the legislature, in order to aid in the enforcement of certain criminal statutes, banned the use of automobiles by the

[34] 297 U. S. 189, 197 — S. Ct. — (1936).
[35] 303 U. S. 95, 108, — S. Ct. — (1938).

general public because law violators use automobiles in their illicit operations.

Conclusion

It is the opinion of this Court that the plaintiffs are entitled to a permanent injunction restraining and enjoining the defendants Mac Q. Williamson, Granville Scarland, Robert L. Wheeler, and all remaining County Attorneys in the State of Oklahoma from enforcing or attempting to enforce against the plaintiffs[36] the provisions of sections 2, 3 and 4 which have been designated as unconstitutional in this written opinion.[37]

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[36] The Court recognizes that the legislature has the authority to prevent "bait-advertising" and other evils associated therewith in the nature of corporate practice; and, that the instant plaintiffs at this time may be engaged in practices which rightly can be prohibited by the legislature in a valid enactment; however, the legislature cannot, as here attempted, kill the patient in order to eliminate the disease.

[37] The Attorney General has not urged that the plaintiffs are not entitled to equitable relief even though certain provisions of the instant Act have an unconstitutional impact upon the plaintiffs. However, this Court is not unmindful of the cardinal principle that Federal courts of equity should not interfere with the processes of the criminal law in State courts or determine questions of criminal liability under those laws, unless in most exceptional circumstances in order to prevent irreparable loss. *Beal* v. *Missouri Pac. R. Co.* (1940) 312 U. S. 45, 50; and "* * * the imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified." *Watson, et al.* v. *Buck, et al.* (1941) 313 U. S. 387, 400. *Cf. Spielman Motor Co.* v. *Dodge* (1935) 295 U. S. 89, 95.

The plaintiffs' allegations, together with the undisputed proof, indicate that immediate and unrelenting enforcement of all the provisions of this Act, provisions clear in meaning and intent, by the defendant state officers, is imminent; in fact, defendants' counterclaim in this suit specifically demands injunctive relief against the plaintiffs as authorized by section 6 of the instant Act. The inevitable result of the enforcement of the provisions found by this Court unconstitutional in Points I and II of the opinion, as applied to the two dispensing optician plaintiffs, will be to literally put said plaintiffs out of business; unquestionably, from such an injury there can be no adequate remedy at law and that such will result is not conjectural but positive. The effect of the enforcement of the Act

Counsel should submit a journal entry to conform with this opinion within 15 days.

Dated this 1st day of March, 1954.

Filed Mar. 1, 1954. Theodore M. Filson, Clerk, by ——, Deputy.

No. 6002-Civil

MURRAH, *Circuit Judge*, Dissenting in part:

With reluctance and some misgivings, I concur in that part of the judgment of the court declaring unconstitutional the legislative prohibitions against fitting, adjusting, adapt-

on the unconstitutional feature discussed in Point III of the opinion, as applied to plaintiff, Dr. Rips, although not resulting in putting Dr. Rips clear out of business, will be to compel said plaintiff to relinquish a very desirable and valuable lease and to move to another place of business. Insofar as all plaintiffs are concerned no adequate remedy is available; the State cannot be held responsible for the business loss of the two dispensing optician plaintiffs or the loss of a lease by plaintiff Rips, valued at more than $5000; and, certainly a lessor cannot be held responsible for cancelling a lease in conformity with a state criminal law requirement (notice of cancellation of which has already been given).

It is contrary to the spirit of reason as well as equity to direct these plaintiffs to choose between complying with all provisions of the instant Act, thus submitting to irreparable and irrecoverable business losses while the constitutionality of the provisions of the statute are tested; or, to continue in business, thus violating the clear language of the criminal law countless numbers of times each day in the hope that eventually such prosecutions will prove unsuccessful because of the unconstitutional nature of the criminal statute. Significantly, section 6 of the instant Act provides: "Any person, firm * * * violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished for each such offense, as provided by law * * *"; and, 21 Okla. Stat. Anno. § 10 states that "* * * every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding one year or by a fine not exceeding five hundred dollars, or both such fine and imprisonment. * * *" What facts could more pointedly justify the exercise of equitable authority than these,—where the plaintiffs are faced with both an injunctive prohibition and a liability for multiple criminal prosecutions. See *Toomer* v. *Witsell* (1947) 334 U. S. 385, 391. Also, see *Parker* v. *Brown* (1942) 317 U. S. 341, 349; *Family Sec. Life Ins. Co.* v. *Daniel* (D. C. S. C. 1948) 79 F. Supp. 62, reversed on other grounds 336 U. S. 220. As observed by the three judge court in *Rhoe* v. *Reed* (D. C. Me. 1950) 93 F. Supp. 554, 558, in a case directly in point: "Equitable juris-

ing or applying lenses, frames, prisms or other optical appliances to the face of a person or duplicating or replacing the same without prescriptive authority of a licensed ophthalmologist or optometrist.

The obvious result of this legislation is to appropriate a property right of one class to follow a legitimate calling or occupation and to give it to another class not shown to be more competent in the public interest. Indeed, the evidence shows that it would be inimical to the public interest to require the wearer of eye glasses to return to the ophthalmologist in order to obtain a prescription for the replacement or duplication of eye glass, or to place the burden upon the ophthalmologist of merchandising frames and mountings and other appliances, or placing that purely commercial monopoly in the optometrist. There is no rational basis for depriving the optician of the right to perform this purely mechanical and commercial service to the public.

I cannot agree, however, that the legislature of the state may not constitutionally prohibit any person, firm, company, corporation or partnership from soliciting the sale of frames, mountings, prisms, or any other instrument deemed essential and used in the field of visual care by enumerated methods of advertising when it does so for the declared purpose of vouchsafing the "best possible visual care" to the public.

The effect of the order of the court is to make it unlawful to advertise the sale of spectacles, eye glasses or lenses but to allow any person, firm, company, corporation or partnership to solicit the sale of the empty frames, mount-

diction in the premises on the ground of a threatened irreparable injury is clear and imminent is obvious, for the loss of a season's fishing can not be restored, and the State of Maine provides no means for recovering damages in money to compensate for the loss occasioned by an illegal deprivation of the right to fish commercially within its coastal waters. (citing case) Nor do we see any occasion here for application of the doctrine of American Federation of Labor v. Watson, 327 U. S. 582 • • • for the Maine statutory provisions involved are clear and need no interpretation, and so far as we are aware no other special circumstance exists requiring the federal courts to stay action pending proceedings in the courts of the State."

ings, prisms and other appliances or devices. By this method one so engaged may circumvent the very evil to which the legislation is aimed, namely, prohibiting dishonest and dangerous practices in the sale of optical goods and devices.

There can be no doubt of the power of the legislature to regulate advertising practices of retail dealers of eye glasses. See State v. Rones, 67 So. 2d 99, and cases cited at Page 105. There may be good reasons for requiring the prohibition of advertising the sale of merchandise, the actual sale of which is not prohibited. Commonwealth v. Ferris, 25 N. E. 2d 378. It is true that all of the statutes which have been upheld as a valid regulation or restriction on the advertising of the sale of eye glasses have been judicially construed to apply to the furnishing of optometrical services or actual visual care, and not the mere sale of frames, mountings or fittings as merchandise. But I entertain no doubt of the power of the legislature to regulate the advertising of the empty frames, mountings and prisms and other optical devices if the object of such legislation is the prevention of fraud or mistake or to protect the public against deceptive practices in the broad field of visual care. The power of the state to regulate or restrict advertising of a commercial business affected with a public interest has been upheld in a great variety of cases, including the sale of eyeglasses. See Commonwealth v. Ferris, supra, at page 380; Commonwealth v. Nutting, 55 N.E. 895, affirmed 183 U.S. 553; Ritholz v. Commonwealth, 35 S.E. 2d 219.

Considered in isolation, an eye glass frame or mounting is no more than a mere piece of merchandise. But considered in the context of the total field of visual care, it takes on a significant relationship to the visual needs of the public and ceases to be a mere piece of merchandise to be dealt with in the market place on an arms length basis. As the dispenser of the completed eye glass the optician is a trained technician -the "right arm" of the ophthalmologist. As such he may be held to a standard more strict than the morals of the market place. Certainly the well-defined and legitimate functions he performs, both as

a trained technician and a merchandiser, in the field of visual care are affected with a public interest, and the public may not be left to deal with him at arms length. And it is the same with the merchant optometrist. Certainly in the eyes of the public the optometrist is not seen in his dual capacity of a merchandiser as to whom he is required to deal at arms length, and a professional in whom he can place his trust and confidence.

The challenged act is a legislative scheme to effect one declared public policy and each of its parts ought to be considered in pari materia in determining whether or not the legislature has acted beyond the scope of its broad and comprehensive police powers. Section 4 is pertinent, therefore, to the inquiry whether a valid constitutional basis can be found for prohibiting the advertisement of the merchandise not of itself related to visual care. Section 4 prohibits rebates, kick-backs, and solicitation by those selling optical goods, appliances or materials. And it forbids corporate practice. All of these we leave as proper subjects of police power. But the judgment of the court strikes down that part of the section which prohibits any retail establishment from renting space in its establishment to any person doing eye examinations or visual care. This prohibition in the statute is said not to bear any reasonable relationship to the admitted power of preventing corporate practice, or for that matter any other practice deemed not in the public interest.

I agree that on its face it seems unreasonable and irrational to deny to the professional man quarters in a retail establishment. But to me the undisputed facts in this case point up the very evil to which the legislation is aimed.

Ellis Carp is the owner or is interested in eighteen optical establishments in Texas. All of them are dispensing opticians. He is also interested in a supply house in Dallas where lenses are ground on orders from the dispensing opticians. In Texas, Mr. Carp employs persons on salary to refract the eyes of those who are induced to come to his optical establishments. By this method the dispensing optician solicits the business, refers the customers to the salaried employee who does the refracting and prescribes

for the visual correction. The prescription is returned to the optician for filling, fitting and adjusting. So, the optical company operating under a trade name actually performs the optical services constituting the very corporate practice which Oklahoma legislation condemns and prohibits.

In Oklahoma, Mr. Carp owns and operates the Douglas Optical Company in Tulsa in space rented from the Zale Jewelry Company. The Douglas Optical Company is a dispensing optical company which advertises by all of the media condemned in the challenged legislation. Soon after the Douglas Optical Company commenced business, Dr. Rips, a licensed ophthalmologist, and formerly in the employ of Carp in Dallas, came to Tulsa; conveniently rented space in the Zale Jewelry Company and set himself up in practice. Admittedly all of the members of the public seeking visual care, who are induced to come to Douglas by its advertisements, are referred to Dr. Rips, and while no one is compelled to take Dr. Rips' prescription to Douglas, "most of them go there because they generally come from there."

Mr. Carp is also the president of a corporation known as the Lee Optical Company with ground floor offices in the American National Building in Oklahoma City. It employs advertising media condemned and prohibited in the legislation. Soon after the Lee Optical Company opened for business in Oklahoma City, Dr. Conti formerly employed by Carp in Texas to refract eyes, came to Oklahoma City and established himself in offices on the third floor of the American National Building. All of the members of the public who are induced to come to the Lee Optical Company for visual care are referred to Dr. Conti whose prescriptions usually find their way back to Lee Optical Company for filling.

While neither Conti nor Rips is employed by Lee Optical Company or Douglas Optical Company, and neither of them rebates for the referrals, the reciprocal arrangements enable them to completely commercialize the whole field of visual care, which we agree is affected with public interest and subject to legislative control.

Under the order of the court, Douglas may continue to occupy space in Zale's Jewelry Company in Tulsa. Dr. Rips may continue to occupy space under the same roof. The Douglas Optical Company may continue to advertise frames and mountings and other optical devices by radio, television, classified ads, and by any other commercial means. It will continue to attract the unsuspecting public, who not knowing the difference between an optician, ophthalmologist, or optometrist, will undoubtedly find their way to Dr. Rips, who having prescribed will see that they are returned to Douglas in order to complete the cycle.

The loophole which this judgment leaves in the legislative scheme is wide and in my judgment glaring. It is an unwarranted interference with the police power of the state over a subject with which the state is fully competent to deal. To borrow the language of Mr. Justice Holmes: "We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the lawmaking power." Noble State Bank v. Haskell, 219 U.S. 104, 110.

In cases of this kind we ought to keep in mind the extremely limited restrictions that the due process clause of the Fourteenth Amendment places upon the states; and that federal courts should negatively inject themselves into the policy making powers of the states only in the presence of a palpable abuse of the due process clause of the constitution.

Sections 3 and 4 have uniform application and incidence to all affected thereby. There is no question of equal protection of laws involved. Only the question of due process

under the Fourteenth Amendment is involved, and the basis of our jurisdiction is injunctive relief against the enforcement of a state statute with criminal sanctions. Before we rush in to strike down a part of the act, we ought to consider that due process in the state court is afforded to any person who would challenge any provision of the act by exposing himself to the criminal penalties involved. There is no more firmly established or salutary rule than the admonition against striking down the criminal laws of a state by federal injunctive process. Federal injunctive interference with the criminal laws of a state is justified only in exceptional circumstances and with a showing of great and immediate irreparable damage. Otherwise the accused should first set up a defense in the state court where his constitutional rights may be amply protected. See Watson v. Buck, 313 U. S. 387, 400. Reed v. Lehman, 91 F. 2d 919; Starnes v. City of Milledgeville, 56 F. Supp. 956.

I would certainly stay the federal hand in respect to the enforcement of Sections 3 and 4 of the act. As to Section 2, while I have some misgivings about injunctive relief, I am clear on the issue of constitutionality.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6002 Civil

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, dba Douglas Optical; and ORAN RIPS,

Plaintiffs,

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANVILLE SCANLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma, et al.,

Defendants

Before MURRAH, Circuit Judge, and VAUGHT and WALLACE, District Judges

JUDGMENT AND DECREE—Filed March 29th, 1954

This cause having come on for further and final hearing, and the issues therein having been tried before the Court without a jury, and the evidence of all of the parties hereto having been heard, and the cause having been argued and briefed by counsel, and the Court after being fully advised, having heretofore filed its written opinion herein, which opinion constitutes the Court's findings of fact and conclusions of law,

Now it is this date declared, ordered, adjudged, and decreed as follows:

(1). That the following portions of House Bill No. 953 (Title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma Statutes) are unconstitutional and void, to-wit:

> (a) Those portions of Section 2 (Title 59, Chapter 24, Section 942, Oklahoma Statutes), which makes it unlawful for any person not a licensed optometrist or ophthalmologist "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other

optical appliances to the face of a person . . .' or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision . . ." except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist;

(b) That portion of Section 3 (Title 59, Chapter 24, Section 943, Oklahoma Statutes), which makes it unlawful "to solicit the sale of . . . frames, mountings . . . or any other optical appliances";

(c) That portion of Section 4 (Title 59, Chapter 24, Section 944, Oklahoma statutes), which provides that "No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sub-lease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store".

(2) That the temporary restraining order entered in this cause on September 2, 1953, be and the same is hereby made permanent and perpetual against the defendants Mac Q. Williamson, Granville Scanland, Robert L. Wheeler, and the remaining defendants who are county attorneys in the State of Oklahoma, their agents, servants, employees, assistants, deputies and attorneys and all persons in active concert and participation with them, insofar as it restrains them from enforcing or attempting to enforce against the plaintiffs the provisions of House Bill 953 (Title 59, Chapter 24, Sections 941-947, Oklahoma Statutes) declared and adjudged unconstitutional and void herein, and they are hereby permanently enjoined from doing so.

(3) The temporary restraining order is further made permanent and perpetual against the defendant Zales Jewelry Company, a corporation, insofar as the same restrains the said defendant from cancelling or terminating its lease to plaintiff Rips on the ground of violation of the provisions of House Bill 953 (Title 59, Chapter 24, Sections 941-947, Oklahoma Statutes), declared and adjudged unconsti-

tutional and void herein, and it is hereby permanently enjoined from doing so.

(4) The plaintiffs and their surety are forever discharged and released from any and all liability by reason of their restraining or injunction bond given in this cause and the *same* is for naught held.

(5). The counterclaim of the defendant county attorneys and attorney general is held in abeyance, but jurisdiction of this cause is retained for the purpose of giving full effect to this judgment and for the purpose of making such further and other orders and decrees, or taking such further action, if any, as may become necessary or appropriate to carry out and enforce the Court's judgment.

(6) The costs of this action are hereby assessed against the defendant county attorneys and attorney general.

Dated at Oklahoma City, Oklahoma, this 29 day of March, 1954.

W. R. WALLACE,
Judge;
EDGAR S. VAUGHT,
Judge.

APPENDIX "C"

AN ACT RELATING TO VISUAL CARE; DEFINING TERMS; PROHIBITING DISHONEST AND DANGEROUS PRACTICES IN THE SALE OF OPTICAL GOODS AND DEVICES; PROHIBITING DISCRIMINATION; MAKING THE ACT CUMULATIVE TO OTHER LAWS; MAKING VIOLATION OF ACT MISDEMEANOR; AUTHORIZING INJUNCTION AGAINST VIOLATORS

Be it Enacted By the People of The State of Oklahoma:

Section 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person

shall be permitted to visually correct for compensation the eyes of another.

Section 2. It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951,

> to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or ony other optical appliances to the face of a person, or
>
> to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or
>
> to give any treatment or training designed to aid human vision, or
>
> to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section.

except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951 may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who is accordance therewith

> may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and
>
> may continue to do the said acts on the aforesaid written prescription, or its duplicate,

provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses.

Section 3. It shall be unlawful for any person, firm, company, corporation or partnership

to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement;

or

to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction.

Provided, however, that the provisions of this Act shall not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor of said commodity or material; Nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices.

Nothing in this Act shall prohibit the sale of ready-to-wear glasses equipped with convex spherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

Section 4. It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction

to receive or accept any rebate, kick-back, reward or premium from any optical company or any other person, firm or corporation dealing in optical goods, appliances or materials, or

knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any person licensed

under the provisions of Chapters 11 or 13 of Title 59 Oklahoma Statutes.

It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization, group or lay person and

It shall be likewise unlawful for any corporation, lay body, organization, group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of a person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1941,

provided that this sentence shall not apply to the University of Oklahoma School of Medicine and Hospitals, or to a bona fide resident physician of a licensed hospital.

No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store. Nothing in this Section shall prohibit a person licensed under Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes, from organizing or maintaining a professional association with other persons licensed.

Section 5. No department, commission, board, official, employee, or agency of the State of Oklahoma, or of any county, municipality or other subdivision of the State of Oklahoma shall, in the performance of its duties and functions in obtaining examination for refractions and visual training or correction for citizens of this State discriminate between persons licensed to perform examination for refraction and visual training or correction within the field for which their respective license entitle them to practice; and

no such department, commission, board, official or agency of the State, county, municipality, or other subdivision shall

send any resident of the State of Oklahoma out of this State to receive or be furnished such services.
This Section shall have no application with respect to any person confined in the University Hospitals.

Section 6. Any person, firm, company, corporation, or partnership violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished for each such offense, as provided by law, and in addition thereto may be enjoined by a Court of competent jurisdiction for any further violations of the provisions of this Act.
It shall be the mandatory duty of the county attorneys of the respective counties to bring such injunction suits when a verified complaint is filed with such county attorney alleging any violations of this Act.
This Act shall not supersede other laws, but shall be cumulative to other statutes of the State of Oklahoma.

Section 7. If any of the provisions of this Act shall be held by a Court of competent jurisdiction to be inapplicable to a specific person or set of circumstances, the same shall not affect the validity of this Act in regard to other persons or circumstances.

Section 8. The provisions of Sections 1, 2 and 6 of this Act shall not extend, limit or affect the legal scope of practice of persons licensed under the provisions of Chapter 14, Title 59, Oklahoma Statutes 1951.

APPENDIX "D"

WILLIAM ROSCHEN,

Appellant,

v.

HAMILTON WARD, Attorney General of the State of New York, JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, et al., etc. [No. 667.]

S. S. KRESGE COMPANY,

Appellant,

v.

HAMILTON WARD, Attorney General of the State of New York, JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, et al., etc. [No. 668.]

(See S. C. Reporter's ed. 337-340.)

Constitutional law, § 668—forbidding sale of spectacles—validity.

A merchant is deprived of no constitutional right by a statutory provision making it unlawful to sell at retail, in any store or established place of business, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist is in charge of, and in personal attendance at, the place where the articles are sold.

[Nos. 667 and 668.]

Argued April 10, 1929. Decided April 22, 1929.

Appeals by complainants from decrees of the District Court of the United States for the Southern District of New York dismissing bills filed to enjoin the enforcement of a statute forbidding the sale of spectacles. Affirmed.

See same case below, 29 F. (2d) 762.

The facts are stated in the opinion.

Mr. Justice Holmes delivered the opinion of the Court:

These are suits brought by dealers in eye glasses for an injunction prohibiting the enforcement of Chapter 379 of the New York Laws of 1928, which amends the Education Law by inserting two sections, of which the material portion makes it unlawful to sell at retail in any store or established place of business any spectacles, eye glasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and (in) personal attendance at the booth, county or place, where such articles are sold in such store or established place of business. The complainants moved for a preliminary injunction, a statutory court of three judges was convened and after a hearing the injunction was refused and the bills were dismissed on the ground that no cause of action was shown. 29 F. (2d) 762.

The complainants sell only ordinary spectacles with convex spherical lenses, which merely magnify and which it is said can do no harm. The customers select for themselves without being examined and buy glasses for a relatively small sum. It is said that the cost of employing an optometrist would make the complainants' business impossible, and that in the common case of eyes only grown weaker by age the requirement is unreasonable. But the argument most pressed is that the statute does not provide for an examination by the optometrist in charge of the counter. This as it is presented seems to us a perversion of the Act. When the statute requires a physician or optometrist to be in charge of the place of sale and in personal attendance at it, obviously it means in charge of it by reason of and in the exercise of his professional capacity. If we assume that an examination of the eye is not required in every case, it plainly is the duty of the specialist to make up his mind whether one is necessary and, if he thinks it necessary, to make it. We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon

against using common sense in construing laws as saying what they obviously mean. Moreover, as pointed out below, wherever the requirements of the Act stop, there can be no doubt that the presence and superintendence of the specialist tend to diminish an evil. A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce.

Of course we cannot suppose the Act to have been passed for sinister motives. We will assume that there are strong reasons against interference with the business as now done—but it is obvious that much good would be accomplished if eyes were examined in a great many cases where hitherto they have not been, and the balancing of the considerations of advantage and disadvantage is for the legislature not for the Court. We cannot say, as the complainants would have us say, that the supposed benefits are a cloak for establishing a monopoly and a pretense.

Decree affirmed.

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No. 184 and No. 185

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANVILLE SCANLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma, et al.,

Appellants,

VERSUS

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, doing business as Douglas Optical; and ORAN RIPS,

Respondents.

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, doing business as Douglas Optical; and ORAN RIPS,

Appellants,

VERSUS

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANVILLE SCANLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma, et al.,

Respondents.

BRIEF OF THE APPELLANTS, MAC Q. WILLIAMSON, ATTORNEY GENERAL OF OKLAHOMA, ET AL.

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;
FRED HANSEN,
First Assistant Attorney General;
JAMES C. HARKIN,
Assistant Attorney General;
FRED DAUGHERTY,
PAUL HARKEY,
LEROY POWERS,
Attorneys for Appellants.

Of Counsel:
EDMUND G. BROWN,
Attorney General of California;
EIMO G. FUNKE,
Assistant Attorney General of California.

January, 1955.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8750

INDEX

	PAGE
I. Opinion Below	1
II. Jurisdiction	2
III. Question Presented	3
IV. Statute Involved	4
V. Statement	4
VI. Summary of Argument	8
Argument and Authorities	10
General Statement	10
First Proposition. Sections 1 and 2 of the Act, pertaining to eye examinations and the furnishing of corrective eyeglasses to the public, are valid enactments under the Police Power of the State in the interest of public health and welfare	18
Second Proposition. The provisions of Section 3, prohibiting advertising, are valid in the interest of public health and welfare under the Police Power of the State	39
Third Proposition. The provisions of Section 4 of the Act, prohibiting the corporate practice of Ophthalmology and Optometry in Oklahoma, are valid enactments under the Police Power of the State in the interest of public health and welfare	57
Counterclaim	72
Conclusion	74
Appendix follows brief	

INDEX CONTINUED PAGE

CITATIONS

CASES:

Burford v Sun Oil Company, 319 U.S. 315, 87 L. Ed. 1424 17

Carter Oil Co. v. Wood (1940), 30 Fed. Supp. 875 74

City of Springfield v. Hurst (Ohio, 1944), 56 N.E.2d 185 ..... 9, 30-31, 48-50

Commonwealth v. Ferris (Mass., 1940), 25 N.E.2d 378 51-53

Commonwealth v. Kresge Company (Mass., 1929), 166 N.E. 558 ..... 9, 24-28

Co-operative Law Company, In re (N. Y.), 92 N.E. 15 44

Curtis v. Registered Dentists of Oklahoma, 193 Okla. 233, 143 P.2d 427 (cited with approval by the Criminal Court of Appeals of Oklahoma in Curtis v. State, 78 Okla. Cr. 282, 147 P.2d 465) 10, 42-44

Hawks et al. v. Hamill et al., 288 U.S. 52, 77 L. Ed. 610 17

Herkness v. Irion, 49 Sup. Ct. 40, 278 U.S. 92, 73 L. Ed. 198 3

Interstate Busses Corp. v. Blodgett, 48 Sup. Ct. 230, 276 U.S. 245, 72 L. Ed. 551 3

Kindy Opticians, Inc, v. Michigan State Board of Examiners (Mich., 1939), 291 Mich. 152, 289 N.W. 112 37-38

Klein v. Department of Registration and Education (Ill., 1952), 105 N.E.2d 758 53-55

Neill et al. v. Gimbel Bros. Inc. (Pa., 1938), 330 Pa. 213, 199 Atl. 178 60-62

Palmer et al. v. Smith (N.C., 1948), 51 S.E.2d 8 ..... 36, 37

INDEX CONTINUED

PAGE

Palmetto Fire Ins. Co. v. Conn., 47 Sup. Ct. 88, 272 U.S. 295, 71 L. Ed. 243 3

Philadelphia-Detroit Lines, Inc. v. Simpson (1940), 37 F. Supp. 314 16-17

Ritholz v. Commonwealth (Va., 1945), 35 S.E.2d 210 ..... 9, 28-30

Roschen v. Ward, Attorney General of the State of New York, 279 U.S. 337, 72 L. Ed. 722 ..... 9, 20-24, 39

Sage-Allen Co. v. Wheeler (Conn., 1935), 179 Atl. 195 19

Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 79 L. Ed 1086 9-10,40-42,59-60

State Bar v. Retail Credit Association, 170 Okla. 246, 37 P.2d 954 44

State of Louisiana v. Rones (June, 1953), 67 So.2d 99 44-47

Sears Roebuck & Co., et al. v. State Board of Optometry (Miss., 1952), 57 So.2d 726 63-67

STATUTES:

Chapter 13, Title 59, page 271, Oklahoma Session Laws 1953—59 Okla. St. Ann. §§ 941-947 ..... 2, 4

Federal Rules of Civil Procedure, Rules 1 to 16, 28 U.S.C.A. 73

House Bill 953, Sec. 1 ..... 8, 9, 18

House Bill 953, Sec. 2 ..... 5-6, 8, 9, 18

House Bill 953, Sec. 3 ..... 5, 9

House Bill 953, Sec. 4 ..... 5, 10, 57-59

House Bill 953, Sections 2, 3, 4, 5 and 6 (See Appendix) 4

Judicial Code of the United States (28 U.S.C.A., § 1253) 3

Judicial Code of the United States (28 U.S.C.A., § 2201) 2

INDEX CONTINUED PAGE

Judicial Code of the United States (28 U.S.C.A., § 2202) 2
Judicial Code of the United States (28 U.S.C.A., § 2281) 2

CONSTITUTION:

Constitution of the United States, Art. 1, Fourteenth Amendment 2

In the
Supreme Court of the United States
OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANVILLE SCANLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma, ET AL.,
Appellants,
VERSUS
LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, doing business as Douglas Optical; and ORAN RIPS,
Respondents.

No. 185

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, doing business as Douglas Optical; and ORAN RIPS,
Appellants,
VERSUS
MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANVILLE SCANLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma, ET AL.,
Respondents.

BRIEF OF THE APPELLANTS, MAC Q. WILLIAMSON, ATTORNEY GENERAL OF OKLAHOMA, ET AL.

I

Opinion Below

The opinion and partial dissent thereto of the United States District Court for the Western District of Oklahoma in this cause is reported in 120 F.Supp. 128. Said opinion

appears on page 36 of the Transcript of Record. The partial dissent of Circuit Judge Murrah appears on page 62 of said record.

II

Jurisdiction

This is a civil action commenced by the respondents in the United States District Court for the Western District of Oklahoma in which they seek (R. 13—prayer of complaint) to have House Bill 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 13, Title 59, page 271, Oklahoma Session Laws 1953—59 Okla. St. Ann. §§ 941-947), relating to the visual care of Oklahoma citizens, declared unconstitutional and void under Section 2201 of the Judicial Code of the United States (28 U.S.C.A., § 2201) and state officials enjoined from enforcing the same under Sections 2201 and 2202 of the Judicial Code of the United States (28 U.S.C.A., §§ 2201 and 2202), for the alleged reason that portions of said Act violate Sections 8 (Interstate Commerce) and 10 (Obligation of Contracts), Article 1 of the Constitution of the United States and the "due process" and "equal protection" clauses of Article 1 of the XIV Amendment to the Constitution of the United States.

As required by Section 2281 of the Judicial Code of the United States (28 U.S.C.A., § 2281), the matter was heard by a district court of three judges. On the 29th of March, 1954, the three-judge court, with the Circuit Judge dissenting in part, entered and filed its Judgment and Decree (R. 27). The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sec-

tion 1253 of the Judicial Code of the United States (28 U.S.C.A., § 1253). Probable jurisdiction was noted herein (R. 487). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment and decision of the District Court on direct appeal in this case: *Palmetto Fire Ins. Co.* v. *Conn.*, 47 Sup. Ct. 88, 272 U.S. 295, 71 L. Ed. 243; *Interstate Busses Corp.* v. *Blodgett*, 48 Sup. Ct. 230, 276 U.S. 245, 72 L. Ed. 551; *Herkness* v. *Irion*, 49 Sup. Ct. 40, 278 U.S. 92, 73 L.Ed. 198.

III

Question Presented

The primary question presented in this appeal is whether or not said Act of the Oklahoma Legislature, relating to the visual care of the public, is so clearly violative of the constitutional and statutory provisions of the United States, referred to in the complaint, as to warrant the three-judge Federal District Court:

(a) entering a declaratory judgment holding *certain provisions* of said Act unconstitutional and void (see concluding portion of the "Statement" herein), and

(b) issuing an order enjoining the Attorney General of Oklahoma and each of the 77 County Attorneys of said State from enforcing or attempting to enforce *such provisions of said Act* by criminal or civil proceedings authorized therein.

IV

Statute Involved

The statute of the State of Oklahoma involved is House Bill 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 13, Title 59, page 271, Oklahoma Session Laws 1953—59 Okla. St. Ann., §§ 941-947). Said bill, with Sections 2, 3, 4, 5 and 6 thereof divided for sake of clarity into their constituent parts, is attached as an APPENDIX hereto.

V

Statement

House Bill 953 is an act relating to the visual care of the people of Oklahoma. Its primary aim is to assure that the citizens of Oklahoma receive the best possible visual care and to protect the public against various activities in the field of visual care which the Oklahoma Legislature deemed detrimental to the public interest, health and welfare. To a certain extent, the activities of the ophthalmologist and the optometrist (that is, persons licensed under the provisions of Chapters 11 or 13, Title 59, Oklahoma Statutes 1951—see Section 1 of said house bill), both *professional practitioners* in the field of visual care, and the activities of the optician, *a non-professional* in the field of visual care (not licensed in Oklahoma), are regulated and controlled by the provisions of this law as their activities pertain to the visual care of the public. In other words, it is not a medical law, or an optometry law, or an optician law. As its title indicates, it is a law relating to visual care,

and its provisions embrace the activities of all those involved in furnishing corrective eyeglasses and visual care to the public.

Section 2 of House Bill 953 provides for professional responsibility in the matter of prescribing, fitting, adapting and duplicating eyeglasses for visual correction, but authorizes the optician to prepare or grind lenses, fit and adapt eyeglasses to the face, and to duplicate a lens provided he has the professional's prescription for the eyeglasses in his shop. And the optician may continue to do said acts on said prescription.

Section 3 of House Bill 953 prohibits the solicitation of the sale of eyeglasses, lenses, frames, mountings, etc., through advertising means by any person, be he ophthalmologist, optometrist or optician. This section is aimed at protecting the public from bait and misleading advertising and other unscrupulous and unethical means of advertising whereby the visual care of the public is handled without proper professional care and responsibility.

Section 4 of House Bill 953 prohibits rebates, the solicitation of eye examinations, the hiring of physicians or optometrists to make eye examinations by lay persons or companies, and in furtherance of such prohibition against the "corporate practice" of ophthalmology or optometry, prohibits a retail merchandising establishment from subleasing departments or renting space to doctors wherein they may examine eyes for corrective eyeglasses.

The District Court has declared (R. 27) the following portions of Section 2 of House Bill 953 to be unconstitutional and void:

"(a) Those portions of Section 2, Title 59, Chapter 24, Section 942, Oklahoma Statutes, which make it unlawful for any person not a licensed optometrist or ophthalmologist 'to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person * * *' or 'to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *' except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist;"

Circuit Judge Murrah concurred (R. 62) in the above portion of the opinion and judgment "with reluctance and some misgivings."

The District Court, with Circuit Judge Murrah dissenting, declared (R. 28) the following portion of Section 3 of said House bill to be unconstitutional and void:

"(b) That portion of Section 3 (Title 59, Chapter 24, Section 943, Oklahoma Statutes), which makes it unlawful 'to solicit the sale of * * * frames, mountings * * * or any other optical appliances'."

The District Court, with Circuit Judge Murrah dissenting, declared (R. 28) the following portion of Section 4 of House Bill 953 to be unconstitutional and void:

"(c) That portion of Section 4 (Title 59, Chapter 24, Section 944, Oklahoma Statutes), which provides that

'No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or

otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store'."

The District Court *did not hold invalid* those portions of Sections 3 and 4 of House Bill 953 which:

(a) Make it unlawful for any person, firm, company, corporation, or partnership "to solicit the sale of spectacles, eyeglasses, lenses, * * * prisms, * * * by radio, window display, television, telephone directory display advertising, or by any other means of advertising"; or

(b) Make it unlawful for any person, firm, company corporation, or partnership "to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eyeglasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction"; or

(c) Make it unlawful for any corporation, lay body, organization, group, or lay person "in any manner to make an eye examination or perform any visual correction through the means of engaging the services, on a salary, commission, or any other compensatory basis, of a person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951;"

and it was for that reason "Defendants' *Proposed* Judgment and Decree" (R. 24), filed at the request of the District Court (R. 62) after the rendition of its opinion herein (R. 36), *included paragraph "(3)"* (R. 26), enjoining and restraining plaintiffs (respondents here) from violating the last-mentioned portions of said Act. However, by an examination of the "Judgment and Decree" of the District

Court (R. 27), it will be found that same *does not either grant or deny* such injunctive relief, or even refer thereto.

In this connection it will be noted that respondents in the prayer of their complaint (R. 13, 14) asked the District Court to declare the entire Act involved here to be unconstitutional and void under the Constitution of the United States and Section 1 of the Fourteenth Amendment thereto, and to enjoin appellants from enforcing or attempting to enforce the same, and that appellants by counterclaim (R. 22, 23) asked the District Court to declare the entire Act to be constitutional and valid, and (based upon continuing violations admitted in respondents' complaint) to enjoin future violations thereof by respondents.

VI

Summary of Argument

It is the contention of appellants that the furnishing of corrective eyeglasses to the public involves the public health and welfare and that all provisions of House Bill 953 were enacted by the Oklahoma Legislature in the valid exercise of the police power of the State.

Sections 1 and 2 of the Act provide that the citizens of Oklahoma shall receive the best possible visual care and that no person other than a duly licensed physician or optometrist shall fit, adjust, adapt, or apply lenses, frames or prisms to the face of a person or duplicate lenses or give treatment to aid human vision, except that a physician or optometrist by written prescription may authorize an optical supplier, in accordance therewith, to measure, adapt, fit, prepare, dispense, or adjust eyeglasses for the correc-

tion of human vision, and the physician or optometrist shall remain responsible for the full effects of appliances furnished by the optical supplier.

Appellants firmly contend that Sections 1 and 2, *supra*, are valid enactments under the police power of the State of Oklahoma in the interest of public health and welfare *under the principles of law announced by this Court in* the case of *Roschen* v. *Ward, Attorney General of the State of New York*, 279 U.S. 337, 72 L. Ed. 722, and decisions from the supreme courts of many states which follow this leading case. See: *Commonwealth* v. *Kresge Company* (Mass., 1929), 166 N.E. 558; *Ritholz* v. *Commonwealth* (Va., 1945), 35 S.E.2d 210; and *City of Springfield* v. *Hurst* (Ohio, 1944), 56 N.E.2d 185. Appellants emphasize that Sections 1 and 2 of the Act do not eliminate the dispensing opticians. They merely require that the dispensing optician perform his services under the prescriptive authority of a professional practitioner who is licensed by the State and by this Act made responsible for the eye care of his patients.

Section 3 of the Act prohibits soliciting the sale of eyeglasses by advertising and applies to all persons. It is aimed at the elimination of bait and misleading advertising in a field involving the public health and welfare and is for the protection of the public. The right of the legislatures of the several states to regulate or prohibit advertising in a field involving the public health and welfare has been upheld by this Court in the case of *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 79 L. Ed. 1086, wherein the litigants were reminded in a case involving dentistry that the Legislature of Oregon

> "was not dealing with traders in commodities but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place."

The principles of law above announced were followed by the Supreme Court of Oklahoma in *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P.2d 429. The Legislature of Oklahoma was acting within the scope of its police power in a matter of vital interest to public health and welfare in the enactment of Section *3, supra.*

The portion of Section 4 of the Act under attack relates to the prohibition against persons purporting to do eye examinations from renting space or subleasing departments in retail merchandising stores. This prohibition is a regulation of the professions of medicine and optometry, since only physicians and optometrists can legally make eye examinations in Oklahoma. The authority of the state legislatures to regulate the practice of professions which affect the public health and welfare is not open to dispute according to the case of *Semler* v. *Oregon State Board of Dental Examiners, supra.*

ARGUMENT AND AUTHORITIES

General Statement

On September 3, 1953, three days before House Bill 953 went into effect, this action was filed in the United States District Court for the Western District of Oklahoma *by the respondents*, Lee Optical of Oklahoma, Inc., and Ellis Carp, d/b/a Douglas Optical of Tulsa, Oklahoma, which companies are owned and operated by said Ellis

Carp of Dallas, who also owns or has an interest in and operates 35 optical companies in Texas (R. 209) and an optical supply house (DalTex Company—R. 214) in Dallas, which grinds lenses for all of said optical companies, and *by the respondent*, Oran Rips, M. D., who has an office leased from and in the place of business of the Zales Jewelry Company in Tulsa (in which Douglas Optical also has a place of business), who testified (R. 200) that his said office lease was "worth to me $25,000."

Respondents asked said District Court (R. 13) to declare House Bill 953 to be unconstitutional and void, and to thereon enjoin the appellants, Attorney General and 77 County Attorneys of Oklahoma, from enforcing said law as against them *and thereby permit* respondents to continue to carry on their optical businesses and services as outlined in paragraph 11 of their complaint (R. 5), including the advertisement of said businesses and services

> "in newspapers, magazines, by radio, television and by other media of publication."

In this connection appellants respectfully call attention to the testimony of the *respondent, Ellis Carp* (R. 204-220), including his testimony (R. 216-217) concerning Joseph T. Conti, an osteopath formerly employed on a salary basis by him in Texas, who, while authorized to practice osteopathy in Oklahoma (59 O.S. 1951, § 621), is now illegally practicing optometry (59 O.S. 1951, § 589) in connection with Lee Optical in Oklahoma City (R. 200). Appellants further call attention to the testimony of the *respondent, Oran Rips, M.D.* (R. 199-204), also formerly employed on a salary basis by Ellis Carp in Texas, who now

practices optometry in connection with Douglas Optical in Tulsa, as aforesaid. Said testimony of the respondents herein clearly reveals the *type of business* repondents are now asking this Court to in effect legalize by declaring House Bill 953 unconstitutional and void and by enjoining the Attorney General and 77 County Attorneys of Oklahoma from enforcing its provisions as against them. The nature of said type of business is fully presented in Circuit Judge Murrah's partial dissent herein (R. 64 to 67) and in the references to said dissent which appears on pages 51 and 70 of this brief.

It is, therefore, clear that the essential issue involved in this appeal is as follows:

> Is House Bill 953 of the Twenty-fourth (1953) Oklahoma Legislature so clearly violative of the constitutional and statutory provisions of the United States, referred to in the complaint, as to authorize or require the three-judge Federal District Court:
>
> (a) to enter a declaratory judgment in the above cause holding *certain provisions* of said Act unconstitutional and void (see concluding portion of the foregoing "Statement" herein), and
>
> (b) to issue an order in said cause enjoining the Attorney General of Oklahoma and each of the 77 County Attorneys of said State from enforcing or attempting to enforce such provisions of said Act by criminal or civil proceedings authorized therein.

In this connection it will be noted that House Bill 953 relates not only to *opticians* (optical companies) of the State but to licensed *optometrists* and to *physicians* (usually referred to as ophthalmologists or oculists) practicing optometry. It will also be noted:

1. That the Legislature of Oklahoma has never enacted a statute which requires an *optician of this State*, before he is entitled to practice his trade or occupation therein, to possess prescribed educational qualifications or be of good moral character, or to pass a required examination and procure a license as a qualified optician, hence any person in this State, whether skilled or unskilled in the trade or occupation of an optician, and regardless of his educational requirements or moral character, may operate as an optician in this State and (unless prevented by House Bill 953) *by an extensive advertising program solicit and obtain a large and lucrative practice.*

2. That 59 O.S. 1951, §§ 581 and 584 require an *optometrist in this State*, before he is entitled to practice his profession therein, to possess prescribed educational qualifications and be of good moral character. It will be further noted that said sections in effect provide that the practice of optometry in Oklahoma includes the science and art of "examining the human eye," as well as of "correcting or relief of ocular abnormalities," and that the required examination of applicants for a license to so practice covers many subjects, *including biology, bacteriology, ocular pathology, ocular neurology and ocular myology;* knowledge in said subjects by an optometrist being necessary to enable him to determine, *while examining the human eye*, if the ocular abnormality complained of, such as squint, etc., is caused by syphillis, focal infection, diabetes, or other pathological conditions which should be treated by the use of drugs or surgery by physicians and surgeons, rather than corrected or relieved by the use of lenses or prisms by optometrist, and

3. That 59 O.S. 1951, §§ 492 and 494 require a *physician of this State* (including an ophthalmologist or oculist), before he is entitled to practice his profession therein, to possess prescribed educational qualifications and to be of good moral character. It will be further noted that said sections, as well as 59 O.S. 1951, § 589, authorize physicians to practice optometry in this State and that the required examination of applicants for a license as a physician covers many subjects, including anatomy, physiology, hygiene, chemistry, surgery, obstetrics, gynecology, bacteriology, pathology, medical jurisprudence and meteria medica.

Respondents, as aforesaid, seek to have this Court declare said house bill, which regulates the furnishing of corrective optical goods to the citizens of Oklahoma, to be invalid and unconstitutional. In general, respondents object to said Act because:

(a) It requires opticians to have a written prescription from a physician or optometrist before they may supply corrective glasses to the public.

(b) It prohibits all persons from soliciting eye examinations and the sale of corrective glasses by means of advertising, and

(c) It forbids "corporate" or "commercial" practice in making eye examinations, and in furtherance thereof prohibits rental of space in retail merchandising stores for the purpose of making eye examinations.

Appellants believe that the purpose and intent of House Bill 953 is to assure that the people of Oklahoma receive the best possible visual care through the atten-

tion (and responsibility) of professional practitioners, namely, licensed physicians and optometrists, and not by unlicensed, non-professional persons or commercial interests except pursuant to prescriptive authority, and to establish regulations pertaining to the sale of corrective eyeglasses to the public. The Act involved is separate from, but cumulative to, the medical and optometry laws of Oklahoma.

For the purpose of this brief appellants propose the separation of the Act into three distinct parts:

> The *first* will involve Sections 1 and 2 thereof, which pertain to eye examinations and the furnishing of corrective eyeglasses to the public;
>
> The *second* will involve Section 3, which pertains to advertising, a portion of which is also involved in Lee Optical's cross-appeal, and
>
> The *third* will involve Section 4, which prohibits "corporate" or "commercial" practice in the field of eye examinations.

Appellants will not unnecessarily burden this Court with citations on the well-recognized rules of law to the effect that legislative acts are presumed to be valid; that their invalidity must be proved beyond a reasonable doubt; that the entire Act is considered in ascertaining the legislative intent; and that the courts are not interested in the wisdom of the legislative enactment, which may be harsh or impolitic, so long as the same has some rational relation to the public health and welfare. Neither will appellants burden this brief with a discussion of that part of the record herein which refers to the *activities of persons*

either supporting or opposing in the Oklahoma Legislature the enactment of House Bill 953, since such activities have absolutely nothing to do with the validity or invalidity of the Act.

However, since respondents contend that the Act is invalid under the Commerce Clause, attention is called to the case of *Philadelphia-Detroit Lines, Inc.*, v. *Simpson* (1940), 37 F.Supp. 314, wherein it is stated:

> "The Supreme Court of the United States has had occasion to consider state statutes, respecting the use of state highways, in two very recent cases, *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 58 S.Ct. 510, 82 L.ed 734, and *Maurer et al.* v. *Hamilton*, 309 U.S. 598, 60 S.Ct. 726, 84 L.ed. 969.
>
> "In the *South Carolina* case (303 U.S. 177, 58 S. Ct. 517, 82 L.ed. 734), Mr. Justice Stone said: '* * * When the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. * * * This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. * * *
>
> " 'Being a legislative judgment it is presumed to be supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination, we examine the record, not to see whether the

findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis'."

Also, since respondents are asking this Court to issue an order enjoining the Attorney General of Oklahoma, as well as the 77 County Attorneys of said State, from enforcing the provisions of House Bill No. 953, attention is called to the case of *Hawks et al.* v. *Hamill et al.*, 288 U.S. 52, 77 L. Ed. 610, wherein it is stated:

"Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to issue 'unless in a case reasonably free from doubt.' * * *

"Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials through the rights asserted by the complainants are strictly federal in origin. * * *."

The above holding, which involves decisions of the United States District Court for the Western District of Oklahoma and the United States Court of Appeals of the Tenth Circuit in relation to an Oklahoma law, is cited and quoted with approval in the footnotes of *Burford* v. *Sun Oil Company*, 319 U.S. 315, 87 L. Ed. 1424.

First Proposition

Sections 1 and 2 of the Act, pertaining to eye examinations and the furnishing of corrective eyeglasses to the public, are valid enactments under the Police Power of the State in the interest of public health and welfare.

Sections 1 and 2 of House Bill 953, summarized together, provide that the people of Oklahoma shall receive the best possible visual care; that only licensed physicians and optometrists are permitted to make eye examinations and adapt corrective glasses to the face, except, that an optical supplier or dispensing optician on prescriptive authority of a physician or optometrist may interpret his prescription, grind the lenses therefrom, and duplicate, replace, fit, adapt, and adjust glasses for the patient, and continue thereafter to do such acts on such prescriptive authority; further that the physician or optometrist issuing a prescription *is responsible for the full effect of appliances furnished the patient.*

Differently stated the Act provides that only physicians and optometrists shall make examinations of the human eye for glasses, opticians shall supply glasses to correct defective vision to the public only pursuant to prescriptive authority of the professional practitioner who is fully responsible for the care of the eyes of his patient.

Respondents say this imposes undue limitations on the age-old function of the optician. The Oklahoma Legislature says that the care of the eyes of the public *should be entrusted to, and be the responsibility of* qualified, licensed, professional men. It is not believed that because opticians may have done certain things in the past is material. In

years past, barbers practiced dentistry, but with the progress of science and civilization, dentistry has been eliminated from their functions and properly assigned to the dental profession. Many other such examples could be cited.

The care of the eyes of the public is of great public interest. The public health and welfare are involved. The State, under its police power, may enact legislation regarding visual care and the furnishing of eyeglasses to the public for the purpose of correcting defective vision. In this connection attention is invited to the case of *Sage-Allen Co.* v. *Wheeler* (Conn., 1935), 179 Atl. 195, wherein it is held:

> "It is a matter of common knowledge that where a person suffers from defective vision the use of eyeglasses not correctly adapted to remedy the defect may seriously aggravate it, and, because of the resultant eye strain, may bring about nervous and even physical disorders, with accompanying discomfort and loss of efficiency."

In this connection it will be noted that while Dr. Coston (whose qualifications as an ophthalmologist are set forth on page 90 of the record) testified (R. 104) that "ill fitting glasses will cause *no permanent damage* to the eye," he also testified that such glasses will result in the *loss of efficiency* to the patient and tend in some cases "to *aggravate* a nervous condition." Moreover, Dr. Clay (whose qualifications as an ophthalmologist are set forth on pages 227 and 228 of the record) testified (R. 233, 234) that improperly fitted or adjusted eyeglasses were "likely to cause some discomfort," "reduce the efficiency of the patient,"

"add to the nervous tension of the patient or cause a person to be nervous," and that prolonged use of ill fitting glasses will cause "muscular imbalance" of the eye.

The highest authority in support of the instant proposition is found in the case of *Roschen* v. *Ward, Attorney General of the State of New York*, 279 U.S. 337, 72 L. Ed. 722, decided by this Court in 1929. Said case involves a New York law which makes it unlawful to sell at retail any eyeglasses or lenses for the correction of vision, unless a duly licensed physician or optometrist be in charge of and in personal attendance where such articles are sold. MR. JUSTICE HOLMES delivered the opinion, which affirmed the decision of a Three-judge Federal District Court, presided over by CIRCUIT JUDGE AUGUSTUS N. HAND, upholding said law as a valid enactment under the police power of the State of New York.

If New York can validly restrict the sale of eyeglasses for visual correction unless a physician or optometrist be in charge of and in personal attendance, cannot Oklahoma require that opticians furnish glasses only upon the prescriptive authority of a physician or optometrist? It is interesting to note that the New York law contains a provision that it does not apply to persons selling glasses only on prescription from physicians or optometrists. It is thus apparent that Sections 1 and 2 of the Act involved herein have been enacted pursuant to the clear authority of this Court.

Inasmuch as the decision in the *Roschen* case, *supra*, is short and concise, and since the principles of law an-

nounced therein fully support the validity of the Act involved herein, we quote said decision in full, as follows:

"Mr. Justice Holmes delivered the opinion of the Court:

"These are suits brought by dealers in eye glasses for an injunction prohibiting the enforcement of Chapter 379 of the New York Laws of 1928, which amends the Education Law by inserting two sections, of which the material portion *makes it unlawful to sell at retail in any store or established place of business 'any spectacles, eye glasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and (in) personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business.'* The complainants moved for a preliminary injunction, a statutory court of three judges was convened and after a hearing the injunction was refused and the bills were dismissed on the ground that no cause of action was shown. 29 F.(2) 762.

"The complainants sell only ordinary spectacles with convex spherical lenses, which merely magnify and which it is said can do no harm. The customers select for themselves without being examined and buy glasses for a relatively small sum. It is said that the cost of employing an optometrist would make the complainants' business impossible, and that in the common case of eyes only grown weaker by age the requirement is unreasonable. But the argument most pressed is that the statute does not provide for an examination by the optometrist in charge of the counter. This as it is presented seems to us a perversion of the Act. When the statute requires a physician or optometrist to be in charge of the place of sale and

in personal attendance at it, obviously it means in charge of it by reason of and in the exercise of his professional capacity. If we assume that an examination of the eye is not required in every case, it plainly is the duty of the specialist to make up his mind whether one is necessary and, if he thinks it necessary, to make it. We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean. *Moreover, as pointed out below, wherever the requirements of the Act stop there can be no doubt that the presence and superintendence of the specialist tend to diminish an evil.* A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce.

"Of course we cannot suppose the Act to have been passed for sinister motives. We will assume that there are strong reasons against interference with the business as now done—but it is obvious that much good would be accomplished if eyes were examined in a great many cases where hitherto they have not been, and the balancing of the considerations of advantage and disadvantage is for the legislature not for the Courts. We cannot say, as the complainants would have us say, that the supposed benefits are a cloak for establishing a monopoly and a pretense."

We also quote briefly from the opinion of the lower court involving the New York law, which was written by CIRCUIT JUDGE AUGUSTUS N. HAND and reported in 29 F.2d 762, inasmuch as such opinion clearly recognizes that the type enactment involved herein has a very substantial relation to public health, safety, and welfare, is not in viola-

tion of the due process clause of the Federal Constitution, and is within the police power of the State:

"(2) The second contention is the one on which complainants really rely. They contend that the New York act violates the due process clause of the Fourteenth Amendment of the Federal Constitution, because it has no substantial relation to the public health, safety, and welfare, and therefore is not within the unclassified residue of legislative power of the state known as the police power.

"But can it be justly said that an optometrist, who is 'in charge of and (in) personal attendance at the place where' spectacles 'are sold,' would not substantially remedy the existing evils of haphazard selection of eyeglasses? Can it be reasonably argued that the licensing of physicians is illegal, because no law requires a sick man to employ a doctor? Or shall it be said that laws for fire escapes or rear vision mirrors on trucks, or life preservers and lifeboats on vessels, are unconstitutional, because they contain no directions that they be used by the tenants, drivers, or passengers? *To render an optometrist available wherever eyeglasses are sold is certainly a long step toward correcting existing evils.*

* * * * * * * *

"*If the effect of the new requirement should finally be to render the sale of a standardized product unprofitable, so that the customers in the end would not purchase it, but would have their eyes carefully tested and their glasses made according to special prescription, it cannot be said that the result might not on the whole be desirable.* At any rate, whatever the result to the business of selling a standardized product, *the correction of certain manifest evils was within the legislative power, and the means adopted*

seems to have been reasonably calculated to promote the public health and safety.

* * * * * * * *

"A similar statute to the one under consideration has been adopted in Massachusetts.

"The New York Legislature was not obliged, if it legislated at all, *to require an examination of the customer by a licensed optometrist before permitting a sale of eyeglasses to him. Doubtless it could have done this.* But it might adopt a halfway measure, safeguarding him by in effect placing sales in charge of a man of scientific training, and rendering the services of the latter naturally available. This it did, and this was we think constitutional."

The problem before this Court is not novel. Other states have passed similar laws and they have been upheld by their highest courts. For example, Massachusetts passed a law making it unlawful for anyone not authorized to practice optometry to sell or attempt to sell eyeglasses or lenses for the purpose of correcting human vision, *with the further provision that such law did not apply to physicians or to persons who sell eyeglasses or lenses on prescription from optometrists or physicians.* There is no basic difference in the Massachusetts law and the law involved herein. They both require that opticians furnish glasses to the public only on prescriptive authority of the professional practitioner. The Supreme Court of Massachusetts, in *Commonwealth* v. *Kresge Co.* (Mass., 1929), 166 N.E. 558, upheld the validity of their law, saying that the legislative intent in enacting the same was to *preserve and promote* the public health, and was a valid exercise of the

police power. We cite below several of the pertinent statements contained in said case, as follows:

"The indictment is based upon G. L. c. 112 § 73, as amended by St. 1926, c. 321, §2. Its pertinent words are '*Whoever, not being lawfully authorized to practice optometry, practices or attempts to practice optometry, or sells or attempts to sell spectacles, eye glasses or lenses for the purpose of correcting defective vision,* * * * or violates any other provision of sections sixty-six to seventy-three, inclusive, shall be punished.' * * *

"It is further provided by G. L. c. 112 § 73, as amended by St. 1926, c. 321, § 3: '*The seven preceding sections shall not apply to physicians and surgeons lawfully entitled to practice medicine in the commonwealth, or to persons who neither practice nor profess to practice optometry, but who sell spectacles, eyeglasses or lenses, either on prescription from such physicians or surgeons, or from optometrists authorized to practice in the commonwealth,* or as merchandise from permanently located and established places of business when not sold for the purpose of correcting defective vision.'

* * * * * * * *

"*Every rational presumption will be indulged in favor of the validity of an act of the legislative department of government and the court will not refuse enforcement unless its conflict with the Constitution is established beyond reasonable doubt.* Where practicable, a statute must be so interpreted as not to render it contrary to the terms of the Constitution and also to avoid grave doubts on that score.

* * * * * * * *

"(4) *The main intent of the Legislature in enacting the statute here assailed was to preserve and promote the public health.* The original statute on which the

sections already quoted were founded were St. 1921, c. 700. That statute was declared constitutional in *Commonwealth* v. *Houtenbrink*, 235 Mass. 320, 126 N.E. 669. *The ground of that decision was that the statute was designed and had a rational tendency to promote and preserve the public health and was a valid exercise of the police power.*

* * * * * * * * *

"It is plain that sections 66 to 72 of G. L. c. 112, both inclusive, *were intended in the main to regulate and to govern the treatment of the individual with eye glasses for alleviation of the consequences of impaired vision.* That is apparent both from a general survey of all the sections as a group and from a detailed examination of each section by itself. *The protection of the individual from the effects of treatment for eyes by the ignorant and unskilled was the end sought to be accomplished.*

* * * * * * * *

"They have no application to sales at either wholesale or retail of colored eye glasses or of spectacles made of plain glass, not designed to correct defects in vision but to protect the eye from dust, wind, storm, the glare of the sun, or kindred exposure. Manifestly they have no relevancy to sales of telescopes or microscopes or of lenses therefor.

* * * * * * * *

"(5) It seems to us not open to serious debate that it is within legislative competence to determine that scientific and trained adjustment of eyeglasses and of the lenses of which they are made, to the particular organs of vision of each individual, will be likely to effect a more complete and healthful correction of poor eyesight than the untrained and unaided selection by the customer himself from a mass of eyeglasses. We do not understand that that argument has

been urged in behalf of the defendant. The chief contention is that the statute as now framed by the amendments of 1926 constitutes an unwarrantable interference with the private business of the defendant. *As we interpret the statute, it is directed to the untrained and unscientific, treatment of the eye of the individual customer. The defendant cannot complain that its business is injured by the exercise of the police power for the benefit of the public health.* *Lawrence* v. *Board of Registration in Medicine*, 239 Mass. 424, 132 N. E. 174; *Graves* v. *Minnesota*, 272 U. S. 425, 47 S. Ct. 122, 71 L. Ed. 331.

* * * * * * * *

"The act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary invasion of appellant's property rights guaranteed by the Constitution.

* * * * * * * *

"The police power may be exerted in the form of State legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.

* * * * * * * *

"*It seems to us that the statute here in question conforms to every requirement for validity thus laid down and is not obnoxious to any one of them.* The defendant is undertaking to invade under the guise of private mercantile business a field rightly sequestered, by the Legislative in the interests of the public

health to those possessing special skill and training in a specified department of treatment of human ills.

* * * * * * * *

"*The sections of the statute here under review appear to us to be a reasonable effort to accomplish an improvement in the general health of the community with respect to organs of vision. They do not violate any provision of the Fourteenth Amendment of the Federal Constitution.* They fall within the protecting authority of *McNaughton* v. *Johnson,* 242 U. S. 344, 37 S. Ct. 178, 61 L. Ed. 352, Ann. Cas. 1917B, 801, and *Commonwealth* v. *Houtenbrink,* 235 Mass. 320, 126 N.E. 669, and the cases there collected. To the same general effect is *D. S. Kresge Co.* v. *Ottinger* (D.C.), 29 F.(2d) 762, affirmed by the Supreme Court of the United States, *subnomine S. S. Kresge Co.* v. *Ward,* 49 S. Ct. 336, 73 L. Ed. —, on April 22, 1929."

Ritholz v. *Commonwealth* (Va., 1945), 35 S.E.2d 210, is another very pertinent case which follows the *Roschen* case, *supra,* and applies the principles therein announced to an advertising prohibition law in the field of selling eyeglasses. This case also points out that the Act does not constitute class legislation since the furnishing of eyeglasses affects the public health and is a matter within the police power of the state. If the public health is involved the objection of class legislation is not available. The cases relied on by respondents regarding class legislation concern accountants, drain layers, and other pursuits *which have no relation to the public health.* Pertinent portions of the above case are as follows:

"The better reasoned cases hold that restrictions and regulations of the sale of eyeglasses are measures directed to the prevention of substantial harm to the

public health and are within the exercise of the police power of the State.

"In *Roschen* v. *Ward*, 279 U. S. 337, 49 S. Ct., 336, 73 L. Ed. 722, a statute was held constitutional which forbade the sale of eyeglasses or lenses unless a licensed physician or optometrist was in charge and in attendance at the place where they were sold. The constitutionality of the act was upheld on the ground that the State had an interest in seeing that the eyesight of its citizens would not be impaired by the use of eyeglasses or lenses unskillfully selected even by themselves. *If the statute had prohibited the sale of eyeglasses and lenses as merchandise, such a provision would be upheld*, for, as Mr. Justice Holmes said, 'A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce.'

"'*The Legislature evidently was not prepared to prohibit the sale of eye glasses and lenses as merchandise, to be selected by the buyer. But it was prepared to discourage it, by eliminating the temptation to and pressure upon customers that result from the assurance that no more than a named price will be charged, or that the price is less than competitors ask.* As in *Roschen* v. *Ward, supra*, that shorter step is consistent with the Constitution. It is not unlike the prohibition of the sale of drugs, or medicinal compounds by itinerant vendors, sustained in *Baccus* v. *(State of) Louisiana*, 232 U. S. 334, 34 S. Ct. 439, 58 L.Ed. 627.' *Commonwealth* v. *Ferris, supra.*

"*We cannot say that this particular legislative policy of regulating and restricting the advertisement of prices and the sale of spectacles and eyeglasses as merchandise is so arbitrary or unreasonable as to con-*

travene the proper exercise of the police power of the Commonwealth.

"(22) The substance of respondents' contention that the optometry statutes violate the provisions of the Federal Constitution is based upon their conclusion that such statutes are class legislation.

"Mr. Chief Justice Hughes, in *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 612, 55 S.Ct. 570, 572, 79 L.Ed. 1096, addressing his remarks to the constitutionality of statutes regulating the practice of dentistry, used this language: 'We do not doubt the authority of the state to estimate the baleful effects of such methods and to put a stop to them. *The legislature was not dealing with traders in commodities, but with the vital interest of public health* * * *.' *Furnishing glasses affects the public health as much as furnishing artificial teeth.* See *Ritholz* v. *Johnson supra; Ritholz* v. *Arkansas State Board of Optometrists*, 206 Ark. 671, 177 S. W. 2d 410, 411; *Commonwealth* v. *Ferris, supra.*"

The case of *City of Springfield* v. *Hurst* (Ohio, 1944), 56 N.E.2d 185, contains the following pertinent statement in holding that the ordinance involved (prohibiting advertising) had a reasonable relation to the health and general welfare and was a valid exercise of the police power:

"*The sale of eyeglasses by a retail vendor may be regulated if not prohibited altogether.* For instance, statutes which respectively prohibit (a) the sale of eyeglasses unless fitted by a competent person (*D. S. Kresge* v. *Ottinger, Atty. Gen.*, D.C., 29 F.2d 762), (b) a retail sale of eyeglasses unless a licensed physician-optometrist is present (*Roschen* v. *Ward, Atty. Gen.*, 279 U.S. 337, 49 S. Ct. 336, 73 L. Ed. 722), and (c) anyone not a licensed optometrist from selling spectacles,

eyeglasses or lenses, for the purpose of correcting defective vision' (*Commonwealth* v. *S. S. Kresge Co.*, 267 Mass. 145, 150, 166 N.E. 558, 559) have been held constitutional."

This case is clear authority that if the Legislature so desired it might prohibit altogether the sale of eyeglasses by an optician and insist that they be dispensed only by professional practitioners in the same manner that dental appliances are dispensed. The Oklahoma Legislature has not seen fit to go that far and apparently believes that the public health and welfare will be adequately protected by permitting opticians to vend glasses to the public if the prescription of the responsible professional practitioner therefor is at hand.

We wish to emphasize that the Act involved herein does not eliminate the dispensing optician. It merely requires that he perform his services under the prescriptive authority of a professional practitioner who is responsible for the eye care of his patient. This is the precise manner in which the ethical optician operates and prefers to operate. Both the majority (R. 45) and partial dissenting (R. 63, 64) opinions of the lower court have erroneously concluded that one with corrective eyeglasses who desires a new frame or a duplicated lens must first return to the ophthalmologist or optometrist who previously examined him. This is not so by any language of the Act or by contemplated practice. He may return to his optician who has his prescription on file. He may have his prescription in his personal possession and can deliver the same to any optician of his choice. He may call on an optician who does not have his prescription and the optician may obtain the

prescription either from an optician having the same or the examiner who prescribed it. By any of these procedures, the wearer of corrective eyeglasses is assured of having his glasses made and furnished from and in accordance with the professional prescription and all of its directions and thus eliminate the several dangers of getting improperly fitted eyeglasses for one or more of the eleven reasons hereinafter set forth. The property rights of the dispensing optician are not oppressively taken or disturbed. In the interest of better vision and proper fitting, corrective eyeglasses for the public, and the public health and welfare in general, the optician is regulated so as to require that he have before him for guidance the professional prescription involved. This is much like the manner in which the pharmacist or dental technician is required to operate.

Since the federal injunction was entered in 1950 (*United States of America* v. *American Optical Company et al.*, Civil Action 46 C 1333, in the United States District Court for the Northern District of Illinois) against the major optical companies, the majority of dispensing opticians, like the two opticians testifying herein, do not even attempt to grind a lens, which is the age-old function of the true optician (Hill, R. 135; Barber, R. 168-169). Evils and abuses became evident as commercialism attempted to take full control and the gullibility of the public was exploited.

The evidence herein of all the doctors indicates that defective vision is a bodily defect or ill, should receive professional attention and that the professional man should

be fully responsible for the eye care of his patient (Dr. Coston, R. 102; Dr. Clay, R. 229, 230; Dr. Stackpole, R. 247; Dr. Culler, R. 273; Dr. Braley, R. 344, 345, 353, 354, and Dr. Cordes, R. 292, 293, 294). Further that only physicians and optometrists are qualified to make eye examinations (Dr. Coston, R. 107, 108; Mr. Barber, R. 169; Dr. Clay, R. 230; Dr. Culler, R. 271; Dr. Braley, R. 352; Dr. Cordes, R. 283), and that the initial pair of glasses to correct defective vision must be supplied by the dispensing optician from the prescription of a professional practitioner for opticians cannot make eye examinations (Dr. Coston, R. 102, 103; Mr. Barber, R. 169; Dr. Clay, R. 231; Dr. Culler, R. 272; Dr. Braley, R. 352).

Thus the only possible question relating to Section 2 of the Act is whether the dispensing optician should have a prescription in his shop from which duplications of eyeglasses must be made, or should he be permitted to duplicate from the eyeglasses alone and then fit the same to the face without any prescriptive authority or information at hand. The Oklahoma Legislature, after extensive hearings with both views well represented, decided that the public health and welfare in the field of visual care would be better served and protected by the former procedure and in effect decided that the furnishing of glasses to the public should be under professional supervision and responsibility in the same manner that prescribed drugs are dispensed, and false teeth and other dentures are furnished to the patient. The ethical optician is not particularly affected by this decision of the Legislature, but the commercialist optician that preys on the public finds his opportunities curtailed to his financial detriment.

A review of all of the medical evidence in this case reveals that there are at least eleven good and valid reasons why the public is protected and better served in the field of eye care to have duplications of eyeglasses made pursuant to information contained in the prescription, rather than without the same. We enumerate these reasons below and indicate following each, transcript or record references directly or indirectly supporting the same. Doubtless the Legislature, in its consideration of the question, recognized the merit of these reasons and determined that they constituted a rational and reasonable basis for the requirement enacted which we respectfully urge this Court not to disturb:

1. Sometimes prescriptions need to and do contain data regarding the desired distance of the lens from the eyes, and the angle of the lens to the eyes that should be followed in adapting glasses to the patient and which cannot be ascertained from the glasses alone (Dr. Coston, R. 92, 103, 104; Dr. Clay, R. 228, 237; Dr. Benedict, R. 312, 313).

2. Post-operative prescriptions contain necessary information for adapting glasses to the patient which cannot be ascertained from the glasses alone (Dr. Braley, R. 339).

3. Duplication from prescription rather than glasses alone eliminates error that may result from lensometer reading (Dr. Coston, R. 105, 106, 107; Mr. Barber, R. 169, 170; Dr. Clay, R. 235; Dr. Stackpole, R. 250).

4. Prescription will show correct axis of lens whereas lens may have rotated in the frame and resulting lensometer reading would not conform to doctor's

prescription for the axis (Mr. Hill, R. 138, 139; Mr. Barber, R. 165, 166; Dr. Clay, R. 236, 237).

5. Prescription will show correct optical center of lens whereas lens may have rotated in frame and resulting lensometer reading would not conform to doctor's prescription for the optical center (Dr. Clay, R. 236, 237).

6. Optician may undertake to duplicate from an inadequate fragment and furnish incorrect lens to patient, whereas prescription would give correct data for grinding and adapting (Dr. Coston, R. 106; Mr. Hill, R. 142; Mr. Barber, R. 165; Dr. Stackpole, R. 251; Dr. Braley, R. 348).

7. Prescription will indicate correct date of last eye examination and may suggest need for re-examination due to laspe of time (Dr. Coston, R. 109).

8. Lensometer can get out of adjustment, resulting in incorrect reading with patient being supplied with incorrect lens (Mr. Barber, R. 170; Dr. Clay, R. 235; Dr. Stackpole, R. 250, 251).

9. The element of human error in making lensometer reading is always present and may cause incorrect lens to be furnished the patient. This was clearly demonstrated in the courtroom by the respondents' own witness, Hill, a dispensing optician, who misread the axis of the right lens of Mr. Duvall's glasses on the lensometer by five degrees! (Mr. Hill, R. 125, 129, 140, 141; Mr. Barber, R. 169, 170; Dr. Clay, R. 236; Dr. Stackpole, R. 250, 251).

10. Repeated duplications from glasses alone, each within acceptable tolerance, could result in lens being furnished the patient which fails to correspond to doctor's original prescription (Dr. Coston, R. 106; Mr. Hill, R. 139; Mr. Barber, R. 170).

11. Professional men prefer duplications from prescriptions over duplications from glasses alone (Dr. Coston, R. 106, 107; Dr. Clay, R. 235; Dr. Stackpole, R. 250).

The majority opinion admits that the optician should operate subject to qualifying standards when it states that the Oklahoma Legislature has been guilty of undue oppression in failing to set up qualifying standards for them (R. 49). The Oklahoma Legislature, from its consideration of the problem, has decided that the optician is adequately regulated and the public adequately protected by the provisions of House Bill 953 wherein the optician is required to have the professional prescription on hand and the professional man is made responsible for appliances furnished to his patients pursuant to his prescription. The solution of this problem and the method employed is for the Oklahoma Legislature and not the court.

On the duplication question, the respondents relied on the North Carolina case of *Palmer et al.* v. *Smith* (N. C., 1948), 51 S.E.2d 8. This case is distinguished from the situation before this Court in that such case construed the North Carolina optometry law and simply holds that an optician in duplicating a lens is not practicing optometry under the provisions of the optometry law of that state. The Act of the Oklahoma Legislature being considered by this Court is not an optometry law. It does not provide that one duplicating a lens shall be deemed to be practicing optometry. The Act of the Oklahoma Legislature is a new and separate law governing the sale of corrective optical goods to the public, and is designed to protect the public and promote

and preserve the public health and welfare in the field of visual care, *regardless of the person, trade or profession involved in selling eyeglasses.* The North Carolina case says:

> "The sole question for determination on this appeal is whether or not an optical mechanic is practicing optometry when he replaces or duplicates an ophthalmic lense or replaces or duplicates the frame or mounting for such lense."

and further says:

> "It must be conceded that the statute under consideration was intended to regulate the practice of optometry and not the optical trade."

The Act of the Oklahoma Legislature under consideration does not provide that the act of duplicating a lens shall be deemed to be the practice of optometry. Said Act was not intended to regulate the practice of optometry alone and not the optical trade. Oklahoma has a separate optometry law and a separate medical practice act. The Act of the Oklahoma Legislature under consideration clearly was intended to regulate the furnishing of eyeglasses for visual correction to the public by any person, regardless of trade or profession. Indeed if the public is to be afforded proper protection and is to receive the best possible visual care, the whole field must be covered.

Respondents also rely on the case of *Kindy Opticians, Inc., v. Michigan State Board of Examiners* (Mich., 1939), 291 Mich. 152, 289 N.W. 112, which likewise is distinguished in that the Michigan Act considered therein related to optometrists only and not to opticians. The decision so holds

and turns on this point, as is clearly shown by the following extracts therefrom:

> *"The statute in question provides that it shall be unlawful for 'any person to advertise glasses or lenses,* frames or their supporting accessories, with or without frame or mounting at a price, with or without examination of eyes or professional services, or at a price with such phrases as "as low as," "and up," "lowest prices," or words or phrases of similar import; or to offer any gift, premium, or discount in conjunction with the practice of optometry:'.
>
> *"Although plaintiff contended that subdivision (i)* of Sec. 8 of Act No. 223, Pub. Acts 1937 (Stat. Ann. Sup. § 14,648), *was unconstitutional, it abandoned this claim upon appeal, but did insist that said amendment was not within the title of the act, and, therefore, not applicable to plaintiff who was engaged in the business of a dispensing optician and not in the practice of optometry.*
>
> "(3) *The record is convincing that the business in which the plaintiff was engaged was that of a dispensing optician. The title of the act relates to optometrists only, and not to opticians.* We must, therefore, hold that plaintiff was entitled to the relief sought, namely, a declaration by the court that its business, that of a dispensing optician, cannot be interfered with by the defendants, or any of them, while it is engaged in the lawful prosecution of its business."

Again the Act of the Oklahoma Legislature under consideration does not relate to optometrists only but relates to the sale of corrective optical goods to the public by any and all persons, trades, and professions. We, therefore, assert that the *Palmer* case and the *Kindy* case, *supra*, both

dealt with optometry laws only and simply held that such laws could not be extended beyond their titles and scope to cover opticians. The Act under consideration is quite different in title and scope and the *Palmer* and *Kindy* cases are inapplicable.

To conclude and summarize the foregoing proposition we state that under the authority of *Roschen* v. *Ward, supra,* the Oklahoma Legislature under its police power, in the interest of public health and welfare and to assure the best possible visual care for the people of Oklahoma, can regulate the entire field of visual care and in doing so regulate the sale of corrective optical goods and eyeglasses to the public; that the cases relied on by respondents are inapplicable in that they involve optometry laws only which by virtue of their titles and scope were not extended by the courts to include the activities of the opticians, *whereas,* the Oklahoma Act governs all persons, trades or professions that may be involved in the sale of corrective optical goods or eyeglasses to the people of Oklahoma.

Second Proposition

The provisions of Section 3, prohibiting advertising, are valid in the interest of public health and welfare under the Police Power of the State.

Prohibitions against advertising in the field of visual care are not new to the law. In fact, 28 states* have adopted

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* Arkansas, California, Florida, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

laws of this type and they are universally upheld by the highest courts of the land.

To our knowledge, this Court has not had occasion to pass on a prohibitory law against advertising in the field of selling eyeglasses to the public, but has passed on a law against advertising in the dentistry field in the case of *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 79 L.Ed. 1086. We believe that the import of this decision applies with equal force to the advertising of eyeglasses. The *Semler* case involved an Oregon statute prohibiting:

> "* * * advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridgework or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."

In affirming the Supreme Court of Oregon which upheld the validity of the above prohibition against advertising, this Court in an opinion delivered by MR. CHIEF JUSTICE HUGHES said:

> "The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their

profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' The Legislature was aiming at * * * bait advertising. 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed dental work" was, as a general rule, the practice of the charlatan and the quack to entice the public.'

"*We do not doubt the authority of the state to estimate the baleful effects of such methods and to put a stop to them. The Legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place.* The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. *And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous.* What is, generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards.

"It is no answer to say, as regards appellant's claim of right to advertise his 'professional superiority' or his 'performance of professional services in a superior manner,' that he is telling the truth. In framing its policy the Legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The Legislature was entitled to consider

> the general effect of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement (*Booth* v. *Illinois*, 184 U.S. 425, 429; *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 201; *Hebe Co.* v. *Shaw*, 248 U.S. 207, 303; *Pierce Oil Corp'n* v. *Hope*, 248 U.S. 498, 500; *Euclid* v. *Ambler Co.* 272 U.S. 565, 388, 389)."

There is no decision of either of the appellate courts of Oklahoma passing on the validity of a state law relating to or regulating "visual care," or "the sale of *optical* goods and devices." However, the Supreme Court of Oklahoma in *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P.2d 427 (cited with approval by the Criminal Court of Appeals of Oklahoma in *Curtis* v. *State*, 78 Okla. Cr. 282, 147 P.2d 465), upheld the validity of a statute of Oklahoma relating to *dental care* and prohibiting the *sale of dentures to the public* by advertising dental laboratories (same, like optical laboratories or companies, not being regulated or licensed by state law). In this connection it will be noted that the stipulation of facts in the *Curtis* case, as quoted by the Court, *reveals a plan of business almost identical to that of Lee Optical and Douglas Optical herein*, said stipulation being in part as follows:

> "That the United Dental Laboratory, located at 402 South Cheyenne, Tulsa, Oklahoma, is owned and operated by the defendant, Norman V. Curtis, who is not a licensed dentist. That on several occasions persons have gone to the defendant's laboratory for the purpose of having dental plates made. *That said persons went to the laboratory as a result of having seen an advertisement in the local papers*, stating that dental plates

were made and sold by the above defendant, and for other reasons; that upon inquiring of the defendant as to said plates they were told that he would be happy to make the plates for them but it would be necessary for them to see a licensed dentist for the purpose of having the impressions made, from which the plates were to be made, and defendant further suggested *that there was a very good dentist just down the hall, Dr. Moore*, who is and was at all times mentioned in this stipulation a regularly licensed dentist under the laws of the State of Oklahoma. That said persons did contact Dr. Moore and that the impressions were made. *Thereafter, the impressions were taken to the laboratory of the defendant and the plates were made therefrom.* That a contract for the sale of the plates was made by the defendant and the customer; that a separate contract was made by the dentist and the customer for the making of the impressions and that the customer separately paid the dentist and the laboratory for their respective services."

In condemning said plan of business the Supreme Court of Oklahoma held:

"* * * we are of the opinion that it is apparent that it was the intention of the Legislature to protect the public from any person who might undertake to engage in the practice of dentistry without license to do so, *and that part of its purpose was to prevent anyone other than licensed dentists supplying artificial substitutes for natural teeth to the persons who would use them.* An examination of the stipulation of facts discloses that defendant, who had no license to practice dentistry, *was engaged in the business of supplying substitutes for natural teeth to the public at large through advertisements in the newspapers and the telephone directory* which patently were designed to

induce the public to believe that the defendant was authorized to engage in the practice of dentistry by supplying artificial substitutes for natural teeth. This constituted a direct violation of the provisions of the statute quoted, *supra*, against a person holding himself out, or employing methods in any way representing himself as being engaged in the practice of dentistry. *That the states may enact legislation of this type for the protection of citizens is well settled.* See *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 79 L.Ed. 1086."

The above decision of the Supreme Court of Oklahoma, as well as the *Semler* case cited therein (same being heretofore discussed), are in harmony with the decision of the Supreme Court of Oklahoma in the case of *State Bar* v. *Retail Credit Association*, 170 Okla. 246, 37 P.2d 954, wherein said Court, in upholding a writ of injunction against the Retail Credit Association of Oklahoma City *for illegally practicing law in this State*, to-wit: for operating a collection agency therein, cited the case of *In re Co-operative Law Company* (N. Y.), 92 N.E. 15, stating that said case "dealt with the evil effects of the unauthorized practice of law by corporations," and quoted with approval from said case, as follows:

"The degradation of the bar is an injury to the State."

In the field of furnishing eyeglasses to the public, a number of decisions have been handed down by the state supreme courts pertaining to advertising prohibitions. The most recent is from the Supreme Court of Louisiana in the case of *State of Louisiana* v. *Rones* (June, 1953), 67 So.2d

99. The Louisiana statutes prohibiting advertising provides:

> *"No person shall:*
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> * * * * * * * *
>
> *"(9) Advertise as free or for a price any of the following: The examination, or treatment of the eyes; the furnishing of optometrical services; or the furnishing of a lens, lenses, glasses or the frame or fittings thereof."*

and

> *"No retail dealer shall directly or indirectly, advertise through any medium the sale of glasses, or peddle, solicit, sell, or offer for sale glasses from door to door, or house to house, or away from his permanent established place of business."*

In upholding the validity of the Louisiana statute, as one designed to protect the public, the Supreme Court of Louisiana stated:

> "* * * the second paragraph of the section makes it manifestly clear that no retail dealer shall advertise."

The Oklahoma law is no broader than the Louisiana law. Both prohibit retailers and professional men alike from advertising, through any medium, the sale of eyeglasses to the public. They are identical in import.

The opinion from the Supreme Court of Louisiana further says:

> "The second ground urged by appellant in his motion to quash is that *the statute under which he was charged, insofar as it restricts advertising by retail*

dealers, is unconstitutional because it violates the due process provision of the Fourteenth Amendment of the United States Constitution and of Article 1, Section 2, of the Louisiana Constitution, and contravenes the guaranty of freedom of speech in Article 1, Section 3, of the Louisiana Constitution.

* * * * * * * *

"The question presented by this case is whether a statute which prohibits *any person, thereby including a retail dealer,* from advertising the sale of glasses, lenses, etc., for a price or without cost is a reasonable regulation within the police power of the State and therefore constitutional.

"No citation of authority is necessary that the constitutionality of every statute is presumed, and that it is the duty of the court to uphold the statute wherever possible. For this purpose every consideration of public need and public policy upon which the Legislature could rationally have based such legislation should be weighed by the court, and, if the statute is not clearly arbitrary, unreasonable, and capricious, it should be upheld as constitutional.

"The courts of other states have had occasion to consider the validity of statutes regulating the advertising by *retail dealers of eyeglasses.* In some of the cases the courts have concluded that such regulation was reasonable and proper and constitutional. * * * *We are in accord with the views of those upholding such statutes.* These courts have decided that the statutes are a reasonable exercise of the police power because they prevent 'bait advertising' which attracts the unwary to purchase inferior glasses; eliminate the temptation to, and the pressure upon, customers that result from the assurance that no more than a named price will be charged; protect an uncautious and unwary public from being misled and deceived; prevent the

> increase in sales and the incidental harm that comes from unfitted eyeglasses; eliminate to some extent poor quality and poor workmanship which naturally result from the desire to sell spectacles in quantity at a low advertised price for the purpose of underselling competitors."

This very recent expression from one of the highest courts in the land should indeed be persuasive that laws prohibiting advertising *by all persons* in connection with the sale of eyeglasses to the public are for the protection of the public and constitute a valid exercise of the police power. Protection *must* be afforded the people from commercial interests invading the state who draw people into their places of business by neon signs, newspaper advertisements, radio programs and window displays, only to send them upstairs to an osteopath who is neither qualified nor legally permitted to make an eye examination for glasses in the State of Oklahoma and who sends them back downstairs for their glasses (R. 212, 213). It would indeed be interesting to know if anyone ever failed to get a prescription for glasses at the hands of this osteopath—a former salaried employee of the commercial organization responsible for bringing him to this State (R. 214).

Thus, one of the most important evils sought to be cured by the advertising prohibition is that with the aid of an extensive advertising program to draw in the public, an optician or commercial enterprise can engage in the practice of ophthalmology or optometry by an unholy alliance such as now exists between Lee Optical and Dr. Conti and Douglas Optical and Dr. Rips. Without an extensive advertising program, such alliances would fail, for

neither Dr. Conti nor Dr. Rips could attract sufficient patients to support Lee Optical or Douglas Optical, who admittedly get practically all of their prescriptions from such doctors (R. 214), and Dr. Rips admits (R. 214) that he gets practically all of his patients from Douglas Optical.

In this connection it is clear that if respondents' plan of business is legal, they can, acting in conjunction with some licensed optometrist or ophthalmologist and by the use of an extensive and alluring advertising program, *practically corner the professions of optometry and ophthalmology in the city or territory where they advertise*, since licensed optometrists or ophthalmologists cannot engage in a counter advertising program. The logical, final effect of such a plan of business is either to destroy the professions of optometrists or ophthalmologists or to make them subservient to advertising optical laboratories or companies; *that is*, either to make licensed optometrists and ophthalmologists the employees of advertising optical laboratories or companies or dependent for their livelihood upon such customers they may choose to send to them.

The fact that 28 states have laws prohibiting advertising in the field of visual care is evidence that these commercial interests (and perhaps unethical professional men) have imposed their abusive practices upon the people of many states. In Ohio we find the recent case of *City of Springfield* v. *Hurst*, *supra*. This case involves an ordinance of the City of Springfield, described as follows in the syllabus of the Court:

> "A provision in an ordinance of a municipal corporation, which ordains that 'no person, partnership, cor-

poration, or agent or employee therein engaged in or connected with the sale of eyeglasses, ophthalmic lenses, eyeglass frames and mountings, shall include in any advertisement by newspaper, radio, display, or otherwise, any statement advertising the price of lenses, or of complete eyeglasses, including lenses, either with or without professional services or credit terms, installment payments or price plans,' is a reasonable and valid exercise of the police power and is not violative of the federal or state Constitution."

In this case the defendant contended that the ordinance violated the Fourteenth Amendment to the Federal Constitution. Springfield contended that the ordinance had a reasonable relation to the health and general welfare of the public and was a valid exercise of the police power. The Supreme Court of Ohio said:

> *"The sale of eyeglasses by a retail vendor may be regulated if not prohibited altogether."*

and then after quoting this Court in the *Semler* case, *supra*, to the effect that:

> "* * * (b) bait advertising may be defined as a method used by unethical professional men and others to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them."

continues further with the statement:

> *"It cannot well be questioned that the rule which applies to the dentist would apply to the optometrist. But would it not also apply to the optician?*
>
> "The dentist takes impressions and makes false teeth to fit the mouth. The optometrist measures the eye and, if he chooses to sell complete eyeglasses, grinds the lenses or has them ground and then in-

stalls them in mountings to fit the eyes and face. Then the optician divides work with the optometrist in that the optician sells complete eyeglasses with lenses which he grinds or has ground according to the prescription furnished by the optometrist. In a certain respect, there is a marked similarity between the scope of the work of the dentist and the scope of the combined work of the optometrist and optician. The dentist produces fitted teeth, the optometrist and optician produce fitted eyeglasses complete. But why should legislation against bait advertising as to the price of lenses or complete eyeglasses be held valid as to the optometrist and not as to the optician? Is the prescription more important in relation to health than the grinding according to prescription? Lenses must be prepared by those trained in the grinding. Quality of material and skill in workmanship are prime essentials in producing the finished lenses. Poor quality and poor grinding will naturally result from the desire to sell spectacles in quantity at low advertised price, with the purpose of underselling the optometrist and other opticians who do not indulge in such advertising. *Poor and improperly ground lenses will impair the eyesight of the person to whom they are sold as properly fitted. Thus, legislation prohibiting such bait advertising has a real and substantial relationship to the public health whatever vendor employs the injurious method. The result of forbidding the professional practitioner to resort to such advertising and permitting the optician (or even the retail vendor) to indulge in the harmful practice does not eradicate the evil. The whole field must be covered if protection is to be afforded the public.*"

How true it is that the whole field of visual care, including the optician, must be covered if protection is to be afforded the public. Our ethical opticians, working with

ophthalmologists, have not and will not resort to the abusive practices of respondents who use an osteopath and other imports such as the respondent Rips. The whole field must be covered in order to protect the public and this is what the Oklahoma Legislature has done.

The majority opinion would uphold the advertising prohibition except refuse to apply the same to frames and mountings. We cannot improve on the language of Circuit Judge Murrah in his partial dissent (R. 64) when he says with reference to this exception:

> "By this method one so engaged may circumvent the very evil to which the legislation is aimed, namely, prohibiting dishonest and dangerous practices in the sale of optical goods and devices."

and when he says:

> "But I entertain no doubt of the power of the Legislature to regulate the advertising of empty frames, mountings and prisms and other optical devices if the object of such legislation is the prevention of fraud or mistake or to protect the public against deceptive practices in the broad field of visual care."

In Massachusetts we find the case of *Commonwealth v. Ferris* (Mass., 1940), 25 N.E.2d 378, which concerns the Massachusetts law prohibiting advertising in the field of visual care. This opinion first says:

> "Where the public are not cautious or watchful in their buying habits and are likely to be misled, the Legislature may require not only the absence of active deception but also *affirmative measures* to prevent misunderstanding."

and then, regarding laws prohibiting advertising, says:

"They may be sustained as measures in the interest of the public health, an unquestioned ground for the exercise of the police power. In *Roschen* v. *Ward*, 279 U.S. 337, 49 S. Ct. 336, 73 L.Ed. 722, a statute was held constitutional which forbade the sale of eyeglasses or lenses unless a licensed physician or optometrist should be in charge of and in attendance at the place in the store where they are sold. *The plain implication of the decision is that the State has an interest in seeing that the eyesight of its citizens is not impaired by the use of eyeglasses or lenses unskillfully selected, even by themselves; and that, as the court below had declared (D. S. Kresge Co.* v. *Ottinger*, D. C., 29 F2d 762, 764), *the sale of eyeglasses and lenses might be prohibited unless they should be selected and fitted by competent persons."*

This opinion then concluded by upholding the validity of the Massachusetts law and stated:

"There may well be reasons of public policy requiring the prohibition of advertising to sell merchandise, the actual sale of which is not forbidden. Commonwealth v. *Clapp*, 5 Pick. 41; *Commonwealth* v. *Nutting*, 175 Mass. 154, 55 N.E. 895, 73 Am.St.Rep. 483; affirmed *Nutting* v. *Massachusetts*, 183 U.S. 553, 22 S.Ct. 238, 46 L.Ed. 324; *Delamater* v. *South Dakota*, 205 U.S. 93, 27 S.Ct. 447, 51 L.Ed. 724, 10 Ann.Cas. 733; *Bothwell* v. *Buckbee-Mears Co.*, 275 U.S. 274, 48 S.Ct. 124, 72 L.Ed. 277; *Packer Corp.* v. *Utah*, 285 U.S. 104, 52 S. Ct. 273, 76 L.Ed. 643, 79 A.L.R. 546; *State* v. *Hollinshead*, 77 Or. 473, 151 P. 710; *State* v. *J. P. Bass Publishing Co.* 104 Me. 288, 71 A. 894, 20 L.R.A., N.S., 495. *The following cases tend to support our conclusion that these prohibitions are constitutional in their application to the advertising of the sale of*

lenses and complete eyeglasses, Seifert v. *Bihl Optical Co.*, 276 Mich. 692, 698, 268 N.W. 784; *New Jersey State Board of Optometrists* v. *S. S. Kresge Co.*, 113 N.J.L. 287, 294, 174 A. 353; *State* v. *Goodman*, Minn., 288 N.W. 157."

The case of *Klein* v. *Department of Registration and Education* (Ill., 1952), 105 N.E.2d 758, is a recent and very persuasive opinion concerning an Illinois law regulating the activities of optometrists in relation to advertising. This law first requires optometrists to keep records on prescriptions issued for a period of three years, *and then prohibits neon sign advertising, telephone directory listing dissimilar in size to those used by other practitioners of the healing arts, and window display advertising of eyeglasses and frames.* All the provisions of this law were upheld by the Supreme Court of Illinois in the interest of public health and welfare and as being reasonably calculated to eliminate the injurious effects of uninhibited advertising. We quote from the body of this opinion as follows:

"While at first blush it would seem that sections 13(k) (neon advertising), (l) (telephone directory advertising) and (m) (window display advertising) appear to be an arbitrary interference with the right of one to practice optometry, such thoughts are dispelled when the relative aspects of public health and welfare are considered. As pointed out in *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S. Ct. 570, 572, 79 L.Ed. 1086, the legislature *is not dealing with traders in commodities but with the vital interest of public health and the treatment of bodily ills.* The public is concerned not only with the maintenance of standards which will insure comp-

tency in the individual practitioner, but protection against those 'who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief.' In addition, the community is concerned in providing safeguards not only against deception, but against practices which tend to demoralize the business or profession by forcing its members into unseeming rivalry, which would tend to enlarge the opportunity of the least scrupulous. Advertising by large display, glaring and lighted signs or by depicting a part of the human body, and other forms of advertising, have been held to produce such undesired results and accompanying detriment to the public welfare. *Winberry* v. *Hallihan*, 361 Ill. 121, 197 N.E. 552. In the case last cited and in the *Semler* case, it was held that the legislature was entitled to consider the general effects of the practices it described, and if the effects were injurious in facilitating unwarranted and misleading claims, to counteract them by general rule even though in particular instances there might be no actual deception or misstatement. This the legislature has done in enacting sections 13(k), 13(l) and 13(m) by restricting the advertising of optometrists within limits which are reasonable and calculated to eliminate the injurious effects of uninhibited advertising. Such legislation comes within the police power and is valid. *Winberry* v. *Hallihan*, 361 Ill. 121, 197 N.E. 552.

"Specific objection is made by appellee to the language of section 13(l) which allows a certificate of registration to be revoked for using directory advertising 'that is substantially dissimilar in size, shape, or color to that used for other practitioners of the healing arts in the same directory'. * * * When the general considerations which have fostered the rule that uniform and subdued methods of advertising are de-

sirable in trades and professions which deal with public health and the treatment of bodily ills are viewed in face of appellee's pleading which admits that the duty placed upon him is neither vague nor uncertain, we must conclude that the regulation tends reasonably to serve a legitimate interest of the public."

The above decision prohibits large telephone directory listings, neon light advertising, and window display advertising by optometrists under an optometry law. It finds such prohibition to be within the police power and reasonably calculated to eliminate injurious effects to the public. Under the strong legal principles heretofore quoted and discussed, that the sale of eyeglasses may be prohibited altogether by merchandisers, and that the whole field, including opticians, must be covered if protection is to be afforded the public, there appears to us absolutely no doubt but that under the police powers a state may prohibit newspaper advertising, radio advertising, large telephone directory ads, and window display advertising, and apply such prohibitions to the whole field involved in furnishing eyeglasses which correct defective vision to the public.

Thus it seems to us that beginning with the *Roschen* and *Semler* opinions from this Court and continuing down to the foregoing well-considered opinion of the Louisiana Supreme Court, the solicitation of the sale of eyeglasses by advertising mediums by all persons, commercial and professional alike, may be prohibited under the police power in the interest of public health and for the welfare and protection of the public.

The following brief extracts from the transcript of record herein disclose how ophthalmologists feel about advertising in the field of visual care:

Dr. Culler (R. 273):

"I am against all forms of advertising and solicitation in regard to the care of the eyes."

Dr. Cordes (R. 295):

Q. "Do you think that in the field of visual care that regulations which protect innocent members of the public by prohibiting bait advertising and other forms of advertising for sale of glasses is good for the public health?

A. Yes, I do.

Q. And public welfare?

A. I do."

Dr. Clay (R. 232):

Q. "Doctor, will you state your opinion as to whether or not you think the solicitation of the sale of eyeglasses should be permitted by anybody through the mediums of advertising?

A. No, I do not."

Dr. Braley (R. 355):

Q. "Do you think that advertising should be permitted with reference to the matter of visual care?

A. Not advertising with reference to visual care. So far as I am concerned, I don't think that there should be any."

In summary, we submit that there can be no doubt about the right of the Legislature to prohibit advertising by professional men such as ophthalmologists and optometrists, and under the clear authority of the cases cited above, the Legislature may so restrict the whole field, including the opticians, in order to afford protection properly to the public. No one has the absolute right to advertise his merchandise if the public health and welfare will or can suffer a detriment therefrom. The sinister advertising program of the respondents, done in violation of the laws of Oklahoma, does not serve the public but rather is the means whereby commercial interests actually engage in the practice of ophthalmology and optometry through their puppet doctors. Deprived of the power of advertising, their venture will fail and the people of Oklahoma will return to professional eye care at the hands of qualified ophthalmologists and optometrists. It cannot be said that this action on the part of the Legislature of Oklahoma does not bear a real and substantial relation to the public's health and welfare.

Third Proposition

The provisions of Section 4 of the Act, prohibiting the corporate practice of Ophthalmology and Optometry in Oklahoma, are valid enactments under the Police Power of the State in the interest of public health and welfare.

Section 4 contains several provisions, but respondents object only to the prohibition against ophthalmologists and optometrists renting space or subleasing departments in which to make eye examinations in retail merchandising establishments. However, in order to understand fully the need for such prohibition, it is necessary to discuss

briefly the entire Section and ascertain the legislative intent and the evils sought to be corrected.

The purpose of Section 4 is to prohibit the corporate practice of ophthalmology and optometry in the State of Oklahoma, or differently said, to eliminate commercial control and influence over the professional practice of ophthalmology and optometry. In effect, Section 4 is a measure regulating the practice of the professions of opthalmology and optometry in Oklahoma. Opticians become involved only as they would attempt the rental of space or subleasing of a department in their retail establishments to doctors and thereby become engaged in the unlawful practice of either the profession of opthalmology or optometry.

Section 4 forbids rebates, the solicitation of business for particular doctors, and then makes it unlawful for a lay person or body *to employ* an ophthalmologist or optometrist to make examinations of the human eye for glasses. The testimony of the respondents, Dr. Rips and Ellis Carp, discloses the evils of the corporate practice of ophthalmology and optometry. The Court will further recognize the difficulty in stamping out corporate practice when collusive cooperation exists between the commercialist and the unprincipled professional man, and they deny secret arrangements and sub rosa understandings with reference to professional practices.

Section 4 does not prohibit an optician from setting up shop in a retail merchandising establishment. It only prohibits the ophthalmologist and optometrist from renting space and locating his professional office in such retail

merchandising establishments wherein he would undertake to render professional services to the public. Such rental prohibition is absolutely necessary to eliminate the loophole whereby commercial control will inevitably be exercised over professional activities through the medium of attractive space or a department in a retail merchandising establishment. Even though all parties concerned may vehemently deny such commercial control, it obviously will be present to the detriment of the public, which is entitled to pure and unadulterated professional eye examinations.

The foundation for all the provisions of Section 4 is the right of the Legislature to regulate the practice of a profession. This legislative right is firmly established by this Court in the *Semler* case, *supra*, wherein we find:

> "Plaintiff is not entitled to complain of interference with the contracts he described, if the regulation of his conduct as a dentist is not an unreasonable exercise of the protective power of the State. His contracts were necessarily subject to that authority, *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 343, 363; *Union Dry Goods Co.* v. *Georgia Public Service Comm'n*, 248 U.S. 372, 375, 376; *Sproles* v. *Binford*, 286 U.S. 374, 391; *Stephenson* v. *Binford*, 287 U.S. 251, 276. Nor has plaintiff any ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each. We find no basis for the charge of an unconstitutional discrimination. *Watson* v. *Maryland*, 218 U.S. 173, 179; *Miller* v. *Wilson*, 236

U.S. 373, 384; *Missouri ex rel. Horwitz* v. *North*, 271 U.S. 40, 43; *Dr. Bloom, Dentist, Inc.* v. *Cruise*, 288 U.S. 588.

"The question is whether the challenged restrictions amount to an arbitrary interference with liberty and property and thus violate the requirement of due process of law. That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. *Douglas* v. *Noble*, 261 U.S. 165; *Graves* v. *Minnesota*, 272 U.S. 425, 427. The State may thus afford protection against ignorance, incapacity and imposition. *Dent* v. *West Virginia*, 129 U.S. 114, 122; *Graves* v. *Minnesota*, *supra*. We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals (*Miller* v. *State Board of Dental Examiners*, 90 Colo. 193; 8 P.(2d) 699, 287 U.S. 563), and that it may prohibit advertising that tends to mislead the public in this respect. *Dr. Bloom, Dentist, Inc.* v. *Cruise*, 259 N.Y. 358, 363, 182 N.E. 16, 288 U.S. 588."

In the case of *Neill et al.* v. *Gimbel Bros. Inc.* (Pa., 1938), 330 Pa. 213, 199 Atl. 178, we find the above principles applied to the field of visual care, wherein the Court stated:

"The Legislature has the right to forbid, as contrary to public policy, the practice of a profession by a corporation through duly licensed professional men hired by the corporation, since public policy is properly concerned with the maintenance of high professional standards.

"* * * The rule is generally recognized that a licensed practitioner of a profession may not lawfully

practice his profession among the public as the servant of an unlicensed person or a corporation; and that, if he does so, the unlicensed person or corporation employing him is guilty of practicing that profession without a license. A corporation as such cannot possess the personal qualities required of a practitioner of a profession. Its servants, though professionally trained and duly licensed to practice, owe their primary allegiance and obedience to their employer rather than to the clients or patients of their employer. The rule stated recognizes the necessity of immediate and unbroken relationship between a professional man and those who engage his services. It was applied recently in this Commonwealth in the case of lawyers. The judicial branch of government to which is entrusted the regulation of practice by attorneys at law, has never relaxed the rule. * * * In the absence of statutory modification in favor of hospitals or others * * * the same rule applies to physicians and dentists. * * * The position of a physician normally is not that of a servant of any one. * * * As to optometrists, there seems to be a conflict of authority. Undoubtedly the fitting and sale of eyeglasses began as a trade and not as a profession. There is some support in decided cases for the proposition that it must remain a trade, in which an unlicensed person or a corporation may engage as of right, provided the actual work is done by a skilled servant duly licensed. *Dvorine* v. *Castelberg Jewelry Corp.*, 170 Md. 661, 185 A. 562; *Jaeckle* v. *L. Bamberger & Co.*, 119 N.J. Eq. 126, 181 A. 181, *affirmed* 120 N.J. Eq. 201, 184 A. 520; *State ex inf. McKittrick* v. *Gate City Optical Co.*, 339 Mo. 427, 97 S.W.2d 89; *Georgia State Board of Examiners in Optometry* v. *Friedmans' Jewelers, Inc.*, 183 Ga. 669, 189 S.E. 238. See, also, *Sage-Allen Co., Inc.* v. *Wheeler*, 119 Conn. 667, 179 A. 195, 98 A.L.R. 897. The considerations to the contrary seem to us more weighty. In re-

cent times abnormalities of the eye, like those of the teeth, have been found sometimes to indicate and often to result in serious impairment of the general health. The work of an optometrist approaches, though it may not quite reach, ophthalmology. The learning and the ethical standard required for that work, and the trust and confidence reposed in optometrists by those who employ them, cannot be dismissed as negligible or as not transcending the requirements of an ordinary trade. We cannot pronounce arbitrary or irrational the placing of optometry on a professional basis. This conclusion finds support in other jurisdictions. *State ex rel, Beck* v. *Goldman Jewelry Co.*, 142 Kan. 881, 51 P.2d 995, 102 A.L.R. 334 and note; *State* v. *Kindy Optical Co.*, 216 Iowa 1157, 248 N.W. 332; *Eisensmith* v. *Buhl Optical Co.*, 115 W. Va. 776, 178 S.E. 695; *Funk Jewelry Co.* v. *State ex rel. La Prude*, 46 Ariz. 348, 50 P.2d 945; *Bennett* v. *Indiana State Board of Registration and Examination in Optometry*, Ind. Sup., 7 N.E. 2d 977; *State ex rel, Harris* v. *Myers*, 128 Ohio St. 366, 191 N.E. 99; *State ex rel.* * * *"

It would unduly impose upon the time and patience of this Court to quote from the many cases upholding various legislative enactments passed pursuant to their authority to regulate the practice of professions in the public interest to assure the maintenance of high professional standards and treatment. The question of importance herein is whether, under such authority, an ophthalmologist or optometrist may be forbidden from practicing his profession in the midst of a retail merchandising establishment; and does such type of prohibition and the evils intended to be eliminated thereby bear a real and substantial relation to the public health and welfare.

A very recent case regarding the corporate practice f optometrists and the evils and frauds attendant upon octors leasing space in retail establishments in which they rofess to practice their skills as professional men, is from lissisippi. In this case is found many citations on the subect of corporate practice and the leasing of space, and we nvite the Court to read this case in its entirety. For the onvenience of the Court we will extract certain pertinent anguage from this case, which is *Sears Roebuck & Co., t al.* v. *State Board of Optometry* (Miss., 1952), 57 So.2d 26:

"The chancery court in its final decree enjoined Sears and Craftsman from the practice of optometry 'directly or indirectly, and from employing, by any means, registered optometrist or physicians and surgeons to examine the eyes of their customers and prescribe eye glasses in the state of Mississippi.'

"In the clear and comprehensive opinion the chancellor examined the statutes, and said in part as follows: 'The weight of modern authority is against such arrangements as we have here, and the question presented is whether the optometrist is working for the defendant companies as an employee, or for himself as a licensed and independent practitioner.

" 'It is only in the latter capacity that his status could be legal and his license authoritative in professional relation and service to the public.

" 'The statutory edifice, relating to and regulating optometry in the State of Mississippi, excludes all that it does not include, and merchants and druggists are authorized only to sell and assist purchasers in fitting spectacles and eyeglasses over the counter, and in their place of business at the time of sale.

" 'They are not permitted to hire an optometrist with his license as a screen to hide them from the law while they commercialize the profession, and use him as a handy man to fit and sell glasses as merchandise. In this position the optometrist would be acting as a clerk or salesman, and the employer would in effect be practicing the profession without a license. * * *

" 'It is alleged in defense that the optometrist in this case is not an employee, but is a lessee or tenant of Sears. * * *

" 'Copies of alleged leases, sub-leases, and correspondence agreements, were introduced in evidence to show that the optometrist rents a small space at the Sears' store for $200.00 a month, and in turn sub-rents a part of this space to the Louisiana corporation for $600.00 a month, giving the optometrist a net take of $400.00 a month at the very outset.

" 'The Louisiana corporation is the third party to this triangle, and its business is to supply the glasses which the optometrists sells.

" 'There are other features of these complicated contracts, with their intricate and interlocking arrangements, that are too involved for detailed comment, and which for the present might be passed over.

" 'I am of the opinion, from the evidence, that the optometrist is not renting working space as a tenant in the Sears-Roebuck establishment, but is simply occupying it as an employee or clerk, and that the four hundred-dollar net income from the sub-lease is his assured salary, plus such additional amounts as may have been agreed upon.

* * * * * * * * *

" 'The practice of optometry is undoubtedly one of the subdivisions of the practice of medicine, which

have arisen in modern times by reason of the necessity for specialization. It would seem that the public has as much need to be protected from quacks and charlatans in optometry as in dentistry or any other subdivision of medicine. Cf. *Semler* v. *Oregon State Board of Dental Examiners*, 148 Or. 50, 53, 34 P. 2d 311. One who consults an optometrist for ocular examination is entitled to the same undivided loyalty that he should receive from a physician. *The fact that the optometrist is the employee of an optical concern whose main interest is the sale of optical goods tends to be a distracting influence which may adversely affect his loyalty to the interests of his patient.*

* * * * * * * * *

" 'We think the case is controlled by *Melton* v. *Carter*, 204 Ark. 595, 164 S.W.2d 453. In that case constitutionality of Act 94 was upheld. It was also said that the legislative object was to prohibit employment of an optometrist by one who is not licensed. In other words, under that decision, "a layman may not engage in the profession by employing a licensed optometrist."

" 'The decree in the instant case found that the lease agreement was collusive — "a fiction for the agency that exists between the parties", as the Chancellor expressed it. We think the testimony sustains this finding.'

"*Neill* v. *Gimbel Bros., Inc.*, 330 Pa. 213, 199 Atl. 178 (1938), involved a somewhat similar situation. The store leased to Diamond a portion of its floor space for the operation of an optical department. The court there said that when a lease is accompanied with 'such control as is here shown, the lessee becomes the agent of defendant, and as it is forbidden to practice (optometry), it may not do so through agents.'

"In *State ex rel. Bricker* v. *Buhl Optical Co.*, 131 Ohio St. 217, 2 N.E.2d 601 (1936), the Buhl Optical Company operated an optical dispensary and for a while employed optometrists on a salary. Later the arrangement was changed by a written contract, under which the company leased to several optometrists certain office space in its optical goods store, in consideration of the lessees referring to the company patients for whom they prescribed glasses. For examination the optometrists agreed not to charge more than $1.00, which fees the optometrists alone received. The court held that this arrangement was a subterfuge and that the optical company was in effect still the employer of the optometrists and was violating the statute.

* * * * * * * * *

" 'Of course a lease, valid on its face, may be a mere sham or device to cover up the real transaction; but such a subterfuge will not be permitted to become a cloak for illegal practices. The courts will always pierce the veil to discover the real relationship. Where a corporation directly or indirectly engages in the practice of optometry the lease will afford no protection on a proper challenge of the illegality.' *Rowe* v. *Standard Drug Co.* (Ohio-1937), 132 Ohio St. 629, 9 N.E.2d 609.

"In *State* v. *Kindy Optical Co.*, 216 Iowa 1157, 248 N.W. 322 (1933), the State sued to enjoin the defendant corporation from practicing optometry.

* * * * * * * * *

" 'The subtle attempt on the part of the defendant to evade the provisions of the Iowa statutes in reference to the practice of optometry, by employing a licensed optometrist to conduct its business, and by the execution of the alleged lease with its employee, is too patent to appeal strongly to the court of equity. * * *

"'The execution of the so-called lease between the defendant and its employee Jenson, in connection with the contract of employment between the same parties, was also a sham and fraud and a too evident plan, purpose, and intent to evade the provisions of the statutes herein referred to * * *.'

* * * * * * * * *

"In *Ritholz* v. *Va.*, 35 S.E.2d 210 (Va. 1945), the proprietors of an optical store furnished offices to an optometrist and guaranteed him a minimum income. He collected a $2.00 fee which he retained. He would deliver prescriptions to Ritholz, owner of the optical store. The court discussed a number of cases somewhat similar to the present one, and held that the optometrist was an employee of the store within the prohibitions of the statute; that whether the customers paid a separate fee to the optometrist is not controlling; and that *'the relationship of the parties is not changed by the different methods of payment.'*

"In *State ex rel. Loser* v. *National Optical Stores Co.*, 225 S.W. 2d 263 (Tenn. 1945), the store furnished optometrists with a small office inside the building and guaranteed them a fixed minimum weekly income. The optometrists charged a $2.00 examination fee, which they retained. The court said the activities of the optometrists and the sales of the store were so merged and combined that they constituted a single operation and enterprise; and that the device by which the defendant used the services of the doctors amounted to 'an evasion of the law and is not a *bona fide* arrangement.' See also, *Kindall* v. *Beiling*, 175 S.W. 2d 489 (Ky. 1943); *State ex rel. Standard Oil Company* v. *Superior Court*, 17 Wash.2d 323, 135 Pac. 2d 839 (1943); *McMurdo* v. *Getter*, 10 N.E. 2d 139 (Mass. 1937); Anno., 102 A.L.R. 334, 128 A.L.R. 585, 121 A.L.R. 1455, 141 A.L.R. 883, 888."

The record in this case very plainly shows how the ophthalmologist and the optometrist feels about the corporate or commercial practice of their profession. Brief extracts of their testimony on this point follow:

Dr. Coston (R. 109):

Q. "Do you feel that eye examinations should be done with commercial control and commercial interests predominating?

A. No."

Dr. Culler (R. 273, 274):

Q. "Do you feel that eye examinations should be conducted on a professional basis rather than on a commercial basis?

A. Yes.

Q. Do you think it is a law in the public interest to prohibit ophthalmologists or optometrists from making eye examinations as an employee of any lay group or lay body or commercial interest or commercial enterprise, but rather that they should be limited to making eye examinations as professional men?

A. Yes, I agree to that.

Q. Do you believe any and all measures of legislation which tend to keep eye examinations on a professional basis rather than on a commercial basis is good legislation for the public health and welfare?

A. Yes."

Dr. Braley (R. 354, 360, 362):

Q. "Do you think that human eyesight is a very precious thing?

A. Very valuable, or I would not be in ophthalmology.

Q. Do you think it should be taken care of professionally or commercially?

A. It should be taken care of professionally.

Q. I believe you testified that you believe that the examination of the eyes, and visual care, should be done professionally and not commercially?

A. That is correct. That is what we are striving to get.

Q. Again, in the interest of seeing that defective vision is treated professionally, do you feel that ophthalmologists or optometrists should hire themselves out to the lay person or lay group and make eye examinations for such lay person or lay group?

A. Never.

Q. Do you feel that that arrangement is bad for the public welfare with reference to visual care?

A. I feel that that arrangement is bad for the public welfare.

Q. And this professional service should be free from any commercial control?

A. The professional service should be free from commercial control. I agree to that."

Dr. Cortes (R. 302):

Q. "Do you think that they (ophthalmologists) should set up their office in a retail department store?

A. I do not."

The Oklahoma Legislature, being aware of the many shams and frauds perpetrated through various lease arrangements between a retailer or commercialist and the professional man, *has seen fit to close the door on such subterfuges* and protect the public by requiring the professional man to maintain a professional office and not to practice his profession in the midst of a retail merchandising establishment where he will be subject to commercial control and supervision to the detriment of his patients.

Any property rights which the retail store may have in the matter must be subordinated to the general public interest in the maintenance of high professional standards in examinaing eyes for glasses without commercial control or influence.

CIRCUIT JUDGE MURRAH in his dissenting opinion (R. 65, 66, 67, 68) in digest form has set out the manner and method of the corporate practice now being engaged in by the respondents in the State of Oklahoma contrary to the wishes of its people as expressed by the legislative act under consideration. We respectfully invite your attention to this portion of the dissenting opinion of Circuit Judge Murrah, for it clearly reveals an evil, the eradication of which is within the police power of the State of Oklahoma, which has been rationally and reasonably exercised by Sections 3 and 4 of House Bill 953.

The evils of commercial control of professional activities to the detriment of the public by the practice of giving rebates were so apparent that the Federal Government entered the picture and obtained the injunction of 1950

heretofore cited, against all ophthalmologists as a class and several of the major optical companies.

Respondents rely on the journal entry in the case of *Marks* v. *Frantz, et al.*, entered by the District Court of Sedgwick County, Kansas, as authority that the rental prohibition under consideration herein is void. We have examined the pleadings in this case. A state statute was not involved. All that was involved were rules promulgated by the Kansas Board of Examiners in Optometry pursuant to such authority as had been delegated to them by the Kansas Legislature. The District Court of Sedgwick County only held that the state board, under the authority it had received from the Legislature, was without the power to enact and promulgate such type rules. The court did not say the Legislature of Kansas could not enact such rules into law, but merely that the board had not been so empowered by the Kansas Legislature and such rules were in excess of their delegated power and authority. This is shown by the following quote from the journal entry in this case:

"The court finds that regulation and rule 65-1-3, sub-paragraph 12, of said General Rules of the Kansas State Board of Examiners in Optometry, is without the power of the Board of Examiners in Optometry; and that regulation and rule 65-1-14 is without the power of the Board of Examiners in Optometry; and that said regulations and rules 65-1-3, sub-paragraph 12, and 65-1-14 are invalid and of no force and effect.

* * * * * * * * *

"IT IS BY THE COURT FURTHER ORDERED, ADJUDGED AND DECREED that rule 65-1-3, sub-paragraph 12, and rule 65-1-14 of the General Rules

of the Kansas State Board of Examiners in Optometry are without the power to enact and promulgate by the said Kansas State Board of Examiners in Optometry, and that rule 65-1-3, sub-paragraph 12, and rule 65-1-14 of said General Rules of the Kansas State Board of Examiners in Optometry are and the same are hereby declared invalid and of no force and effect."

It is apparent that the Oklahoma Legislature, in preventing ophthalmologists and optometrists from leasing space or subleasing a department in a retail merchandising establishment, possessed a good knowledge of the means that have been employed in other states to circumvent prohibitions against corporate practice. By Section 4, the Legislature is insisting that the people of Oklahoma receive professional eye examinations, uninfluenced and unhindered by the desire of the retailer or commercialist to sell glasses.

Counterclaim

In the "Amended Answer and Counterclaim of the Appellant, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the Appellants, County Attorneys herein, a verified Counterclaim (R. 22, 23) was made by Appellants against Respondents, as follows:

"For counterclaim against the above plaintiffs, these defendants adopt and incorporate herein the allegations of their foregoing answer and the admitted allegations of the complaint, and allege that House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941 to 947) is a valid and constitutional statute of the State of Oklahoma

enacted as a proper exercise of the police power of the state in the interest of public health and welfare, and further allege that plaintiffs are now and have been violating the provisions of said house bill and unless enjoined by this court will continue to do so.

"WHEREFORE, these defendants respectfully ask the court for an order declaring House Bill No. 953 to be valid and constitutional in all respects, and that the court issue its order permanently enjoining plaintiffs from future violations of the provisions of said house bill."

In the event this Court holds that House Bill No. 953, *supra* (Chapter 13, Title 59, page 271, Oklahoma Session Laws 1953), is not unconstitutional and void, as contended by respondents, it is clear that respondents have been and are now admittedly violating the provisions thereof.

In this connection, it will be noted that 28 U.S.C.A., covers "Federal Rules of Civil Procedure Rules 1 to 16," and that Rule 13 is in part as follows:

"Rule 13. Counterclaim and Cross-Claim.

* * * * * * * * *

"(b) Permissive Counterclaims. A pleading may state as a counterclaim *any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.*

"(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party."

In the case of *Carter Oil Co.* v. *Wood* (1940), 30 Fed. Supp. 875, it is stated:

> "Equity jurisprudence in the United States has always recognized the propriety of cross bills, following the rule that a court of equity has jurisdiction of all cross or counterclaims growing out of and germane and ancillary to the plaintiff's cause of action, even though they could not be pleaded as independent suits within federal jurisdiction. To justify adjudication of a counterclaim, it was only essential that it be of a character making it necessary to realization of complete justice as to the subject matter of the original cause of action. * * *"

It is, therefore, clear that appellants are entitled to have this Court issue an order not only declaring House Bill No. 953, *supra,* to be valid and constitutional but for a further order permanently enjoining respondents from future violations of the provisions thereof.

CONCLUSION

WHEREFORE, premises considered, appellants respectfully ask the Court to hold that House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 13, Title 59, page 271, Oklahoma Session Laws 1953) is in its entirety a valid and constitutional statute of the State of Oklahoma; to decline to enjoin the appellants, Attorney General of Oklahoma and/or the appellants, County Attorneys of Oklahoma, from enforcing the provisions thereof; and to issue an order permanently enjoining respondents from future violations of the provisions of said Act.

Before concluding this brief appellants deem it proper to inform the Court that the names of Edmund G. Brown, Attorney General of California, and Eimo G. Funke, Assistant Attorney General of California, were placed on this brief "Of Counsel" under authority of their telephone request of January 6, 1955, to the Attorney General of Oklahoma, for the reasons, as stated by them, (1) they were of the opinion that certain principles of law announced in the opinion of the trial court herein, as reported in 120 F. Supp. 128, would, if approved by this Court, invalidate or adversely affect certain pertinent statutes of the State of California, (2) they agreed generally with the position of the Attorney General of Oklahoma herein, and (3) they feared they would not have time to file, as they intend to do, an *amicus curiae* brief in behalf of the State of California in this cause.

Respectfully submitted,

MAC Q. WILLIAMSON,
Attorney General of Oklahoma;
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January, 1955.

APPENDIX

AN ACT RELATING TO VISUAL CARE; DEFINING TERMS; PROHIBITING DISHONEST AND DANGEROUS PRACTICES IN THE SALE OF OPTICAL GOODS AND DEVICES; PROHIBITING DISCRIMINATION; MAKING THE ACT CUMULATIVE TO OTHER LAWS; MAKING VIOLATION OF ACT MISDEMEANOR; AUTHORIZING INJUNCTION AGAINST VIOLATORS.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another.

SECTION 2. It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951,

to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or

to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or

to give any treatment or training designed to aid human vision, or

to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section,

except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951 may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith

may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and

may continue to do the said acts on the aforesaid written prescription, or its duplicate,

provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses.

SECTION 3. It shall be unlawful for any person, firm company, corporation or partnership

to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement;

or

to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye

glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction.

Provided, however, that the provisions of this Act shall not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor of said commodity or material;

Nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

SECTION 4. It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction

to receive or accept any rebate, kick-back, reward or premium from any optical company or any other person, firm or corporation dealing in optical goods, appliances or materials, or

knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes.

It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization, group or lay person and

it shall be likewise unlawful for any corporation, lay body, organization, group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of a person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1941,

> provided that this sentence shall not apply to the University of Oklahoma School of Medicine and Hospitals, or to a bona fide resident physician of a licensed hospital.

No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store.

Nothing in this Section shall prohibit a person licensed under Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes, from organizing or maintaining a professional association with other persons licensed.

SECTION 5. No department, commission, board, official, employment, or agency of the State of Oklahoma, or of any county, municipality or other subdivision of the State of Oklahoma shall, in the performance of its duties and functions in obtaining examination for refractions and visual training or correction for citizens of this State discriminate between persons licensed to perform examination for refraction and visual training or correction within the field for which their respective license entitle them to practice; and

no such department, commission, board, official or agency of the State, county, municipality, or other subdivision shall send any resident of the State of Oklahoma out of this State to receive or be furnished such services.

This Section shall have no application with respect to any person confined in the University Hospitals.

SECTION 6. Any person, firm, company, corporation, or partnership violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished for each such offense, as provided by law, and in addition thereto may be enjoined by a Court of competent jurisdiction for any further violations of the provisions of this Act.

It shall be the mandatory duty of the county attorneys of the respective counties to bring such injunction suits when a verified complaint is filed with such county attorney alleging any violations of this Act.

This Act shall not supersede other laws, but shall be cumulative to other statutes of the State of Oklahoma.

SECTION 7. If any of the provisions of this Act shall be held by a Court of competent jurisdiction to be inapplicable to a specific person or set of circumstances, the same shall not affect the validity of this Act in regard to other persons or circumstances.

SECTION 8. The provisions of Sections 1, 2 and 6 of this Act shall not extend, limit or affect the legal scope of practice of persons licensed under the provisions of Chapter 14, Title 59, Oklahoma Statutes 1951.

Nos.

184

185

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Nos. 184 and 185.

In the

Supreme Court of the United States

October Term, 1954.

No. 184.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al., *Appellants,*

vs.

LEE OPTICAL OF OKLAHOMA, INC., et al., *Respondents.*

No. 185.

LEE OPTICAL OF OKLAHOMA, INC., et al., *Appellants,*

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al., *Respondents.*

On Appeals from the District Court of the United States for the Western District of Oklahoma.

BRIEF FOR RESPONDENTS-APPELLANTS LEE OPTICAL OF OKLAHOMA, INC., ET AL.

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INDEX.

PAGE

Jurisdiction 1

Statute Involved 2

Questions Presented 3

Statement of the Case 5

Functions of the Dispensing Optician 7

Duties of the Optician in Filling a Prescription 8

Fitting, Adjusting and Adapting to the Face 9

Merchandising Functions 11

Effect of Eyeglasses 12

Duplication of Eyeglasses 13

Opticians' Relation to Ophthalmology 14

Advertising by Opticians 16

Functions of the Optometrist 17

Rental of Space 19

Effects of House Bill No. 953 20

Summary of Argument 23

Argument 28

I. Section 2 of House Bill No. 953 is unconstitutional because it deprives plaintiffs and persons similarly situated of the right to conduct essential functions of a recognized vocation in violation of the XIV Amendment to the Constitution of the United States 28

A. Section 2 purports to deprive plaintiffs and persons similarly situated of the right independently to perform recognized functions of their craft when such deprivation has no reasonable relation to public health and welfare of the people of the State of Oklahoma 28

B. Section 2 is unconstitutional because it delegates to ophthalmologists and optometrists the authority to determine who shall do business as a dispensing optician 51

C. Section 3 of House Bill No. 953 is unconstitutional under the XIV Amendment because it unreasonably, arbitrarily and capriciously discriminates against plaintiffs and persons similarly situated by exempting from its requirements the sale of ready-to-wear glasses equipped with convexspherical lenses 55

II. In depriving plaintiffs of their right to advertise their merchandise and services, Section 3 of House Bill No. 953 violates the XIV Amendment and also imposes unreasonable restriction upon interstate commerce in violation of Article I, Section 8, of the United States Constitution 59

A. The denial to opticians of the right to advertise their merchandise and services violates the XIV Amendment 59

B. Section 3 places an unreasonable burden and restraint on interstate commerce 71

PAGE

C. Section 3 of House Bill No. 953 is unconstitutional as violative of the equal protection clause of the Federal Constitution 75

III. The court below did not err in holding unconstitutional that part of Section 4 which prohibits a firm engaged in the business of retailing merchandise to the general public from leasing space to a person from the purpose of conducting eye examinations 77

A. Such portion of Section 4 is unconstitutional because it arbitrarily and unreasonably interferes with the enjoyment and use of private property 77

B. Section 4 impairs the obligation of contracts and is, therefore, unconstitutional 86

IV. The court erred in excluding plaintiffs' offered Exhibit 2 87

Conclusion 89

Appendix ..... i-vii

Authorities Cited.

Cases.

American Optical Company v. Nudelman, 370 Ill. 627, 19 N. E. 2d 582 18
Amsel v. Brooks, 141 Conn. 288, 106 A. 2d 152 68
Associated Press v. United States, 326 U. S. 1 72

Babcock v. Nudelman, 367 Ill. 626, 12 N. E. 2d 635 18
Banghart v. Walsh, 339 Ill. 132, 171 N. E. 154 44
Borden's Farm Products Co. v. Baldwin, 293 U. S. 194 ..... 30, 88
Burke v. Kansas State Osteopathic Association, 111 F. 2d 250 88

Chastleton Corp. v. Sinclair, 264 U. S. 543 ..... 30, 88
City of Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707 57
City of Sioux Falls v. Kadinger, 74 S. D. 217, 50 N. W. 2d 797 54
City of Springfield v. Hurst, 144 Ohio St. 49, 56 N. E. 2d 185 ..... 31, 35, 69
City of St. Louis v. Polar Wave Ice & Fuel Co., 317 Mo. 907, 296 S. W. 993 54
Commonwealth v. Ferris, 305 Mass. 233, 25 N. E. 2d 378 68
Commonwealth v. Kresge Co., 267 Mass. 145, 166 N. E. 55 ..... 31, 34
Commonwealth v. Miller, 337 Pa. 246, 11 A. 2d 141 ..... 18, 70
Co-Operative Law Co., In re, 198 N. Y. 479, 92 N. E. 15 70
Curran Bill Posting & Distributing Co. v. City of Denver, 47 Colo. 221, 107 Pac. 261 84
Curtis v. Registered Dentists of Oklahoma, 193 Okla. 233, 143 P. 2d 427 70

Daniel v. Family Security Life Insurance Company, 336 U. S. 220 29
Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 N. E. 2d 827 54

Hammond v. Schappi Bus Line, 275 U. S. 164 ..... 30, 88
Harrigan & Reid Co. v. Burton, 224 Mich. 564, 195 N. W. 60 54
Herkness v. Irion, 278 U. S. 92 2

PAGE

Indiana ex rel. Anderson v. Brand, 303 U. S. 95 86
Interstate Busses Corp. v. Blodgett, 276 U. S. 245 2

Jones v. Bontempo, 137 Ohio St. 634, 32 N. E. 2d 17 61

Kindy Opticians v. Michigan State Board of Examiners, 291 Mich. 152, 289 N. W. 112 50
Klien v. Department of Registration & Education, 412 Ill. 75, 105 N. E. 2d 758 ..... 69, 70
Kresge Co. v. Ottinger, 29 F. 2d 762 (S. D. N. Y., 1928) 31, 33

Levy v. City of Pontiac, 331 Mich. 100, 49 N. W. 2d 80 64
Liggett Company v. Baldridge, 278 U. S. 105 ..... 29, 47
Lincoln Federal Labor Union v. Northwestern I. & M. Co., 335 U. S. 525 29
Little v. Smith, 124 Kans. 237, 257 Pac. 959 75
Lorain Journal Co. v. United States, 342 U. S. 143 72

Miller v. Schoene, 276 U. S. 272 88
Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505 46
Muller v. Oregon, 208 U. S. 412 88

Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405 88
New Jersey Used Car Trade Ass'n v. Magee, 1 N. J. Super. 371, 61 A. 2d 751 47

Old Dearborn D. Co. v. Seagram Distil. Corp., 299 U. S. 183 56

Pacific Palisades Ass'n v. City of Huntington Beach, 196 Cal. 211, 237 Pac. 538 84
Palmer v. Smith, 229 N. C. 612, 51 S. E. 2d 8 ..... 41, 47
Palmetto Fire Ins. Co. v. Conn., 272 U. S. 295 2
People v. Brown, 407 Ill. 565, 95 N. E. 2d 888 53
People v. Ringe, 197 N. Y. 143, 90 N. E. 451 54
People v. Weiner, 271 Ill. 74, 110 N. E. 870 56

Regal Oil Co. v. State, 123 N. J. L. 456, 10 A. 2d 495 62
Rice v. Evatt, 144 Ohio St. 483, 59 N. E. 2d 927 ..... 17, 70
Ritholz v. City of Detroit, 308 Mich. 258, 13 N. W. 2d 283 69
Ritholz v. Commonwealth, 184 Va. 339, 35 S. E. 2d 210 ..... 31, 35
Roschen v. Ward, 279 U. S. 337 ..... 24, 29, 31
Rowe v. Burt's, Inc., 31 N. E. 2d 725 78
Royster Guano Co. v. Virginia, 253 U. S. 412 56
Russo v. Reed, 93 F. Supp. 554 (S. D. Me., 1950) 21

Sage-Allen Co. v. Wheeler, 119 Conn. 667, 179 Atl. 195 31
Scully v. Hallihan, 365 Ill. 185, 6 N. E. 2d 176 42
Sears, Roebuck & Co. v. State Board of Optometry, 213 Miss. 710, 57 So. 2d 726 78
Semlar v. Oregon State Board of Dental Examiners, 294 U. S. 608 69
Smith v. State of Texas, 233 U. S. 630 54
State v. Crawford, 104 Kan. 141, 177 Pac. 360 54
State v. Riedell, 109 Okla. 35, 233 Pac. 684 47
State v. Rones, 223 La. 839, 67 So. 2d 99 ..... 61, 65
State v. Salt Lake Tribune Pub. Co., 68 Utah 187, 249 Pac. 474 73
State Bar v. Retail Credit Association, 170 Okla. 246, 37 P. 2d 954 70
State ex rel. Booth v. Beck Jewelry Enterprises, Inc., 200 Ind. 276, 41 N. E. 2d 622 69
State ex rel. Bricker v. Buhl Optical Co., 131 Ohio St. 217, 2 N. E. 2d 601 78

PAGE

Terrace v. Thompson, 263 U. S. 197 21
Toomer v. Witsell, 334 U. S. 385 21
Traux v. Corrigan, 257 U. S. 312 76
Treigle v. Acme Homestead Asso., 297 U. S. 189 86

Village of Euclid v. Ambler Realty Co., 272 U. S. 365 84

Weaver v. Palmer Bros. Co., 270 U. S. 402 88

Federal Constitution and Statutes.

United States Constitution, Article I, Section 8 2
United States Constitution, Article I, Section 10 2
XIV Amendment to Federal Constitution, Section 1 2
28 U. S. C. §1253 2
28 U. S. C. §§2281-2284 2

State Statutes.

59 Okla. St., 1951, Ch. 11 8
59 Okla. St., 1951, Ch. 13 8
59 Okla. St. Ann., §492 7
59 Okla. St. Ann., §581 ..... 7, 17
59 Okla. St. Ann., §736.1 ..... App. vi, 26
59 Okla. St. Ann., §941 ..... App. i, 2
59 Okla. St. Ann., §942 ..... App. i, 2, 3
59 Okla. St. Ann., §943 ..... App. ii, 2, 3
59 Okla. St. Ann., §944 ..... App. iii, 2, 3, 19
59 Okla. St. Ann., §945 ..... App. iv, 2
59 Okla. St. Ann., §946 ..... App. iv, 2
59 Okla. St. Ann., §947 ..... App. v, 2
General Statutes of North Carolina, §§90-115 47
L. S. A., R. S., Title 37, Chapter 12, §1041 66
L. S. A., R. S., Title 37, Chapter 12, §1063(9) 65
L. S. A., R. S., Title 37, Chapter 12, §1065 65

Miscellaneous.

102 A. L. R. 343 78
128 A. L. R. 575 78
American Journal of Optometry, Vol. 25, pp. 188-191 6
Arrington, History of Optometry 6
Berens, The Eye and Its Diseases (2nd ed., 1949) 6
36 Columbia Law Review 283, 285 88
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49 Harvard Law Review 631 88
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Who's Who in America, Vol. 28 ..... 10, 11

In the

Supreme Court of the United States

October Term, 1954.

No. 184[1].

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al., *Appellants*,

vs.

LEE OPTICAL OF OKLAHOMA, INC., et al., *Respondents*.

On Appeals from the District Court of the United States for the Western District of Oklahoma.

BRIEF FOR RESPONDENTS-APPELLANTS LEE OPTICAL OF OKLAHOMA, INC., ET AL.

Jurisdiction.

This is a civil action in which plaintiffs[2] filed their complaint against defendants Mac Q. Williamson, At-

[1]Together with No. 185, *Lee Optical of Oklahoma, Inc., et al., v. Mac Q. Williamson, Attorney General of the State of Oklahoma, et al.*

[2]Inasmuch as there are two appeals here—No. 184 by defendants from the entire judgment of the trial court, and No. 185 by plaintiffs from a portion of that judgment—the parties will be referred to in this brief as they appeared below.

torney General of the State of Oklahoma and the 77 County Attorneys of that State, requesting a declaration that Sections 2, 3 and 4 of House Bill No. 953 of the 24th (1953) Oklahoma Legislature (59 Okla. St. Ann., §§942, 943 and 944) violate Sections 8 and 10, Article I of the Constitution of the United States and the "due process" and "equal protection" clauses of Section 1 of the XIV Amendment to that Constitution, and further praying injunctive relief, pursuant to the provisions of Sections 2281-2284 of the Judicial Code (28 U. S. C. §§2281-2284), against the enforcement by defendants of said statute. A counterclaim requesting injunctive relief against plaintiffs was filed by the defendants (R. 22-23). The case was heard by a three-judge court, and its judgment holding portions of Sections 2, 3 and 4 unconstitutional was entered March 29th, 1954 (R. 27-29). This Court has jurisdiction to review the judgment entered below by direct appeal by reason of Section 1253 of the Judicial Code (28 U. S. C. §1253). The following decisions sustain the jurisdiction of this Court to review the judgment and decision of the district court: *Palmetto Fire Ins. Co.* v. *Conn.*, 272 U. S. 295; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Herkness* v *Irion*, 278 U. S. 92.

Statute Involved.

House Bill No. 953 of the 24th (1953) Oklahoma Legislature (Chapter 13, Title 59, p. 271, Okla. Session Laws, 1953; 59 Okla. St. Ann., §§941-947), the statute involved in this appeal is set forth in the Appendix, *infra*, pages i-v.

Questions Presented.

The questions presented by these appeals are whether the district court erred in:

(1) Declaring unconstitutional and void those portions of:

(a) Section 2 (59 Okla. St. Ann., §942) which make it unlawful for any person not an Oklahoma licensed ophthalmologist or optometrist "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person or to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority from an Oklahoma licensed ophthalomogist or optometrist;

(b) Section 3 (59 Okla. St. Ann., §943) which make it unlawful for any person "to solicit the sale of * * * frames, mountings * * * or any other optical appliances * * * by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; * * *," and

(c) Section 4 (59 Okla. St. Ann., §944) which provide that "no person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store."

(2) Enjoining the Attorney General of Oklahoma and each of the 77 County Attorneys of that State from enforcing or attempting to enforce the above provisions of House Bill No. 953 by the criminal or civil proceedings provided for in said statute;

(3) Failing to hold unconstitutional and void those portions of Section 3 (59 Okla. St. Ann., §943) that make it unlawful for any person "to solicit the sale of spectacles, eyeglasses, lenses, * * * prisms * * * by radio, window display, television, telephone directory display advertisement, or by any other means of advertisment; * * *," and

(4) Refusing to admit in evidence plaintiffs' offered Exhibit 2 (R. 459; 220, 265).

STATEMENT OF THE CASE.

The district court, all three judges concurring, found Section 2 unconstitutional in so far as it prohibited any person not an Oklahoma licensed optometrist or ophthalmologist from fitting, adjusting and adapting lenses, frames, prisms or any other optical appliances to the face of a person, duplicating and placing into frames, lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction except upon the written prescription of an Oklahoma licensed ophthalmologist or optometrist (R. 44-53). It also found unconstitutional, Judge Murrah dissenting, the complete advertising prohibition of Section 3 in so far as it related to *frames, mountings, or other optical appliances* except completed eyeglasses (R. 53-58) and the prohibition of Section 4 against the renting of space to an ophthalmologist or optometrist in a retail establishment (R. 58-60). In conformity with such findings, the court's judgment declared those portions of the statute to be unconstitutional and further permanently enjoined the Attorney General of Oklahoma and the defendant county attorneys from enforcing such provisions against plaintiffs, and defendant Zales Jewelry Company from terminating its lease with Dr. Rips under Section 4 of the statute (R. 27-29).

The facts pertinent to a determination of these appeals are the following:

In the field of visual care, there are three main groups —the ophthalmologist[3], the optometrist and the optician (R. 116, 158, 310). The ophthalmologist is a medical doctor specializing in eye care authorized by law and trained to

[3]There is no difference between an oculist and an opthalmologist, the title "oculist" being synonymous with "ophthalmologist" (R. 333).

refract eyes and to diagnose and treat pathological conditions of the eye by medicine and surgery (R. 90, 333). The optometrist measures the refractive error of the human eye by means other than the use of drugs, gives eye training and almost invariably sells the eyeglasses prescribed by him. He also sells frames, replacement lenses and duplicates eyeglasses. Unlike the ophthalmologist, he does not issue a prescription which may be filled by an optician of his patient's choice. He is not authorized by law to treat diseases of the eye or to perform eye surgery (R. 133, 159-161, 268, 341-342, 408-411). The optician—a skilled craftsman or artisan—is engaged in the compounding, filling and adapting of prescriptions for eyeglasses and the sale of frames, replacement lenses and other accessories (R. 97-98, 161-164, 268-269, 276-277, 313-314, 412-425). He does not examine eyes or prescribe lenses therefor (R. 109, 169, 327, 349). Of the three groups, the optician is the oldest, dating from the Thirteenth Century at least and possibly from the pre-Christian Era (R. 158-159, 269, 342, 408). He traces his heritage through Thomas Young, an English physicist, Hermann Ludwig von Helmholz, a German physicist, John Dollond, an Eighteenth Century English optician, Sir Isaac Newton, Galileo, Rene Descartes, Christian Huygens, a Dutch physicist, Roger Bacon, and Aristotle (R. 158-159, 408)[4]. The ophthalmologist came next, and lastly the optometrist, who first appeared on the scene about the beginning of the Twentieth Century as a "refracting optician" (R. 160). Subsequently, he assumed the name of "optometrist" and obtained legisla-

[4]Berens, *The Eye and Its Diseases* (2nd ed., 1949), pp. 1-5; Pamphlet, *Optometry, the Profession, Its Antecedents, Birth and Development* (The Chilton Co., 1947); Majersky and Koch, *Criticism of Certain Dispensing Practices and Its Effect Upon Optometry*, 25 The American Journal of Optometry and Archives of American Academy of Optometry 188-191 (1948); Arrington, *History of Optometry* (1929), pp. 13-27.

tive recognition of his refractive functions as a separate profession or vocation (R. 408-410)[5].

Plaintiffs Lee Optical and Carp are "dispensing opticians" and as such do all of the things that historically and customarily have been done by opticians (R. 206)[6].

Functions of the Dispensing Optician.

The work of the dispensing optician has for centuries been a separate, skilled vocation dealing in the fabrication and sale of eyeglasses and parts therefor (R. 158-159, 425). The optician is, and has been traditionally, both a skilled craftsman or artisan and a vendor of merchandise (R. 98, 116-117, 145, 269, 278). The optician is a vital adjunct to the ophthalmologist in the practice of his profession and is to the ophthalmologist what the pharmacist is to the medical practitioner (R. 97). He is a right arm to the modern ophthalmologist and while the optician does not need the educational training of an ophthalmologist to competently perform his functions, yet he is indispensable to the ophthalmologist (R. 97, 269, 277, 282, 335-336).

To fulfill his function as a skilled craftsman, the optician must have a knowledge of the science and terminology of optics and eye care, together with mechanical skill in the manipulation of the machines and tools necessary to the fabrication of eyeglasses and the fitting or adjustment to the faces of persons (R. 278, 335, 342, 408, 412).

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[5]The first state to do so was Minnesota in 1901; the last were Missouri and Texas in 1921.

[6]In its *amicus curiae* brief (p. 16, footnote 8) the American Optometric Association mistakenly assumes that in Oklahoma opticians fit, adjust or apply lenses, frames, prisms, etc., without a prescription, to the face of a person *who does not already wear eyeglasses*. Such assumption is in direct conflict with the findings of the court and the evidence below (R. 46, 109, 145, 151; Complaint, ¶ 11, R. 5-6; Answer, ¶ 8, R. 21). See also, §§492 and 581, 59 Okla. St. Ann., Appendix, pp. v-vi.

At the same time the optician, in fulfilling his merchandising functions, must maintain and furnish to his customers as complete a selection of lenses and frames of various sizes, shapes, color and adornment as may be required to suit his customers' individual taste and as may be necessary to obtain a proper fitting pair of glasses (R. 121, 162-163, 377, 437).

As a skilled craftsman, the optician:

(a) Takes the prescription of an ophthalmologist and translates that prescription into the designated kind and power of lenses (R. 97, 117, 161, 276, 313, 368);

(b) Sells new eyeglass frames for existing serviceable lenses with or without a prescription (R. 165);

(c) Fabricates and sells duplicate eyeglasses with or without a prescription (R. 164-165, 314);

(d) Replaces lenses by duplicating existing lenses (R. 165, 371, 373), and

(e) Otherwise repairs, services and adjusts eyeglasses (R. 276-277, 313, 368).

In all of these functions, the optician fits, adjusts and adapts frames to the face and inserts lenses into frames (R. 121, 162, 164, 268-269)[7]. He does not examine eyes or prescribe lenses for the correction of refractive errors in eyes (R. 109, 169, 327, 349).

Duties of the Optician in Filling a Prescription.

In fabricating initial eyeglasses the dispensing optician measures the distance between the pupils of the eye with an ordinary millimeter ruler or other simple measuring

[7]In their answer (R. 20-21) and at the trial defendants contended that plaintiffs in measuring, fitting, adjusting and adapting eyeglasses to the face, placing or replacing lenses into frames and duplicating eyeglasses without the prescription of an Oklahoma licensed ophthalmologist or optometrist on file were violating the provisions of Chapter 11 (practice of medicine) and Chapter 13 (practice of optometry) of Title 59, Oklahoma Statutes, 1951 (R. 177-190).

tool and makes certain that the horizontal distance between the optical centers of the lenses he inserts into the frames coincides with the distance between the pupils of the eyes except in the rare instances where other instructions are given him in a prescription (R. 92-93, 97-98, 118, 123-124, 268-269, 276, 304, 368, 418). He cuts lens blanks of the correction prescribed* by the professional practitioner to proper size and shape and finishes the edges (R. 118-119). And in the case of some dispensing opticians, he either wholly or partially grinds the lenses to the prescribed correction (R. 97-98, 304, 340). He then inserts the lenses into frames and aligns them (R. 120, 314). In most instances involving high corrective lenses, the optician must adjust the eyeglasses so that the distance from the eye to the lens conforms to that specified in the prescription or if that is not possible for reasons of comfort or facial contour, he determines by mathematical tables the difference in the power of the lens required to compensate for the variation in distance of the lens from the eye from that specified in the prescription (R. 92-93, 122, 171-172). Similarly, through his experience and mechanical skill, the optician, when the patient returns, fits and adjusts the completed eyeglasses to the face of his customer, making certain that everything is centered properly, that the frames are of the proper size, and that the eyeglasses are comfortable (R. 93, 97-78, 121, 269, 276-277, 314, 340, 368, 416-421).

Fitting, Adjusting and Adapting to the Face.

The demonstration of plaintiffs' witness, Hill, included at pages 129 to 132 of the record, shows that the optician in adjusting or fitting eyeglasses to the face, uses only

*Most dispensing opticians do not actually grind the lenses but rather maintain a stock of already ground lens blanks which they cut, edge and finish before inserting into frames (R. 118, 268).

such tools as pliers, small screwdrivers and the like, which, coupled with manual dexterity and the judgment acquired from his training and experience, enable him properly to fit and adjust the completed eyeglasses. The skill of an optician in so fitting glasses to the face is not equivalent to the professional knowledge or skill required of either an ophthalmologist or of an optometrist in performing refractions (R. 45, 98, 269). The testimony of Dr. Tullos O. Coston, a pre-eminent Oklahoma ophthalmologist, Dr. Charles Sheard[9], Director Emeritus of the Division of Biophysics of the Mayo Clinic, Dr. Frederick C. Cordes[10], former president of the American Academy of Ophthalmology and Otolaryngology and chairman of the Department of Ophthalmology at the University of California, Dr. Arthur M. Culler, chairman of the Department of Ophthalmology at Ohio State University; Dr. Alson E. Braley, chairman of the Department of Ophthalmology at the University of Iowa; Dr. William L. Benedict[11], executive

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[9]Dr. Sheard is Professor Emeritus of Biophysics under the Mayo Foundation at the University of Minnesota; Professor of Ophthalmic Optics, Rochester College; Lecturer in Ophthalmology at the Graduate School of Medicine, Tulane University; Interim Dean of the Los Angeles College of Optometry; Fellow of the Optical Society of Great Britain; Fellow of the Ophthalmic Institute of Great Britain; Honorary Fellow of the American Academy of Ophthalmology; Fellow of the Research Society of Ophthalmology; Fellow of the American Academy of Optometry; Life Member of the American Optometric Association; Past President of the American Board of Opticianry, and civilian consultant to Bureau of Medicine and Surgery, U. S. Navy, since 1947. He is the author of numerous texts and treatises in the field of Ophthalmic Optics and was a contributor to the section on Physiological Optics in the American Encyclopedia of Ophthalmology. (R. 403-404; Who's Who in America, Vol. 28, p. 2420.)

[10]Dr. Cordes is a Member of the American Ophthalmological Society; Member of the Section on Ophthalmology of the American Medical Association; member of the Association for Research in Ophthalmology; Fellow of the American College of Surgeons; Civilian Consultant in Ophthalmology to the Surgeon General of the United States Army and Surgeon General of the United States Navy, and Editor of the American Journal of Ophthalmology. (R. 275; Who's Who in America, Vol. 28, p. 560.)

[11]Dr. Benedict is Secretary General XVII International Congress Ophthalmology; former President of the American Ophthalmological Society; Member of the American College of Surgeons; Honorary

secretary-treasurer of the American Academy of Ophthalmology and Otolaryngology and former head of the Department of Ophthalmology at the Mayo Clinic, and Dr. Albert N. Lemoine, head of the Department of Ophthalmology at the University of Kansas, establishes that a qualified optician is competent properly to fit and adjust eyeglasses to the face (R. 98-99, 313-314, 276-278, 340-341, 268-269, 371, 425-427). In fact, Doctors Coston, Lemoine, Benedict, Sheard and Braley stated that the optician is better able to do so than an ophthalmologist who receives no training in such mechanical activities and is certainly as able, if not better able, to perform that function than an optometrist, who receives some, but who today is receiving less training in such functions (R. 98-99, 270, 335, 426-429, 343, 371).

Merchandising Functions.

In fulfilling his merchandising functions, the dispensing optician generally maintains a stock of and displays at his place of business various styles and types of frames and frame adornments (R. 93, 161, 162-163). Frames are standard articles of merchandise and come in standard sizes and various styles. Approximately thirty-five per cent of the average dispensing optician's gross income is derived from the sale of frames into which he inserts the customer's old lenses or replacement lenses which he has duplicated from the original lens by the use of a precision instrument known as the lensometer (R. 196-198, 206)[12]. This portion of the optician's business stems from the customer's desire for a new or different style of frame as

Member of the International College of Surgeons; former Professor of Ophthalmology at the University of Minnesota on the Mayo Foundation; Member of the American Board of Ophthalmology; Honorary Member American Board of Optometry. (R. 309-310; Who's Who in America, Vol. 28, p. 195.)

[12]The lensometer is the most accurate instrument for the measurement of the power of lenses (R. 259).

well as from those cases in which a customer's existing frames may have been broken (R. 165). Also, a significant number of persons desire more than one pair of glasses, in which case the dispensing optician sells both new frames and duplicate lenses which he has made from either the patient's prescription or his old lenses (R. 165). In either case the availability of new and varied types of materials and the increasing public desire for style, design and color in eyeglass frames, stimulates and constantly enhances this phase of the optician's business. The dispensing optician also does considerable repair work on eyeglasses having broken or bent temple pieces, nose pads, etc., and in maintaining them in proper adjustment (R. 277, 368). This service is rendered without charge by practically all opticians (R. 134).

In selling new frames or duplicate eyeglasses and in performing the repairs described above, the optician is required to fit and adjust the new frames or repaired eyeglasses to the face of his customer and, in so doing, the very same acts are required of him as those he performs in fitting and adjusting an original pair of eyeglasses formulated from the prescription of an ophthalmologist (R. 242).

Effect of Eyeglasses.

The testimony of Dr. Sheard and Drs. Benedict, Coston, Lemoine and Clay is that improper eyeglasses cannot cause any permanent damage to the structure of the eye. The human eye has a remarkable tolerance and while eyeglasses with improper lenses may in some cases cause mild discomfort akin to that produced by an ill-fitting pair of shoes, they will not cause any organic damage to the eyes (R. 92, 100, 104, 108, 234, 329, 378, 386-387, 446-447, 452-453). Thus Dr. Benedict said: "I think you would have a very difficult time in demonstrating that any person is

definitely damaged by being supplied with glasses that are not perfect correction of his refractive error" (R. 329). Because of the eye's large tolerance persons often wear with comfort eyeglasses containing lenses of quite different power from those indicated by the results of examination (R. 113, 330, 387). The aim of all practitioners in refraction is to obtain comfort and the best possible vision for their patients (R. 113). As Dr. Coston testified "* * * if the glasses are fitted improperly, and a number of times that will be true, because the patient subjectively didn't give you the proper answers, or maybe the doctor was a little careless that morning, but if he gets the glasses and he sees well, and he has no discomfort, suppose that a mistake had been made somewhere, it is of no importance. You fit the patient with glasses to make him see the best you can, with comfort. Now technically whether you've got it on this axis or that axis is of absolutely no importance, and you find people wearing the screwiest type of glasses, that when you get through examining them, your reading and your interpretation of what they need is exactly different to what they have worn, but they have been quite comfortable and they have seen well with what they have had.

"Now, you have two choices. You can let them wear what they have, or you can give them a new pair of glasses, and very often we let them wear what they have had, if financial matters enter into it. You can't say that the eye is like a piston in a cylinder, you don't have to fit it to that tolerance. Now, we are after comfort and the best vision and that's all" (R. 113).

Duplication of Eyeglasses.

The lenses contained in eyeglasses can be duplicated accurately and with complete safety to the wearer by the use of the lensometer (R. 109-113, 343, 371-373). Where,

for example, an extra pair of eyeglasses is desired, the sensible and economical thing to do is to have one's existing eyeglasses duplicated by an optician (R. 111, 322). A qualified optician can do that without a prescription by using a lensometer to determine the lens strength accurately—more accurately than could be done under a new examination requiring subjective answers — because the lensometer is a precisely accurate instrument (R. 111). Duplication of eyeglasses and lenses by such method is not detrimental to the wearer's eyes and eliminates what otherwise would be the needless expense of an additional examination by an ophthalmologist or optometrist (R. 111, 322). Whether the lenses in the glasses being duplicated may have rotated "off axis" is immaterial because if the lenses are off axis and the wearer is satisfied with them, he can have them duplicated and wear the duplicates without any harm being done. If the old glasses aren't satisfactory, the wearer will not have them duplicated (R. 113).

There is also nothing detrimental to the health or welfare of the wearer in duplicating a broken lens by means of the lensometer (R. 100, 385-387). Only in those cases where the fragment is too small for an optician to determine the axis of a cylinder or the powers of the various segments in the case of multifocal lenses is it impossible to duplicate accurately by the lensometer. In such cases competent opticians will not attempt to duplicate (R. 171, 323, 333-334, 386). But even if a duplication was attempted, it would not injure the wearer's eye (R. 386). Likewise, lenses may be taken out of one set of frames and inserted into other frames without any deleterious effects to the wearer.

Opticians' Relation to Ophthalmology.

The ophthalmologist ordinarily includes in his prescription only the power of lenses required to correct the re-

fractive error in the patient's eye (R. 92, 267, 339, 367). Practically all ophthalmologists leave the measurement of the interpupillary distance, the type and size of frame, the distance from the eye to the lens and the "tip" or panascopic angle of the lens in the completed eyeglasses to the optician (R. 92-93, 239-240, 276, 368). Without the optician to perform the above services, the ophthalmologist would be compelled to devote much of his time to the merchandising and craftsman functions of the optician, thereby neglecting many serious problems such as eye surgery and the treatment of pathological conditions in the eye which he alone in the field can treat (R. 97, 163-164, 379-380). The optician also performs a valuable service to the ophthalmologist and the public in his merchandising of eyeglass frames. In addition to relieving the ophthalmologist of this essentially mercantile duty, the optician serves the public by making it possible for the eyeglass wearer to obtain frames that will suit his taste and his visual needs (R. 93, 162-163, 368-370). This latter is quite important, for unless the patient likes his frames, he won't wear his glasses and thereby loses the benefit of the ophthalmologist's prescription (R. 369). All of the above acts are within the traditional field of endeavor of dispensing opticians (R. 132-133, 163).

The medical testimony is that prescriptions for fitting, adjusting and adapting frames are impossible or impractical to write (R. 101). The only way such fitting and adjusting can be accomplished is with the patient actually present so that the glasses may be "tried on" his face (R. 367-371, 373). In fact, prescriptions of ophthalmologists ordinarily include only the powers of the lenses desired (R. 94, 267, 304, 312-313, 339, 367; Pltfs.' Exhibits 20, 21; R. 479, 480, 129).

Ophthalmologists give their prescriptions to their patients and permit them to have them filled by opticians of

their own choosing (R. 91, 304, 382). In fact, it is considered improper for an ophthalmologist to specify a particular optician to fill his prescription and he should confine himself to recommendation, where requested by his patients, of several opticians (R. 305). However, if under House Bill No. 953, the ophthalmologist remains legally responsible, not only for his examination, but also for the eyeglasses dispensed, he will be compelled to direct his prescriptions to specific opticians (R. 100).

In order to better fulfill its traditional functions and serve the public, opticianry has inaugurated measures directed toward the establishment and promotion of educational standards and qualifications. To this end a board of opticianry has been established to accomplish these objectives through the establishment of adequate collegiate education and laboratory training (R. 311, 430-435). The first function of this board is to foster and support excellence in optical craftsmanship through adequate education and training. The second function is to certificate competent men now in practice and to certificate by examination graduates of schools (R. 434-435). As a result of these efforts two-year courses in opticianry have been established at Rochester College, Rochester, Minnesota, the Institute of Applied Arts and Sciences, University of the State of New York, and in Los Angeles City College, Los Angeles, California (R. 167-168, 431). All of the foregoing courses offer technical instruction in all fields of the optician's endeavor, including duplicating lenses, placing lenses in frames and fitting and adjusting lenses to the face (R. 432-434).

Advertising by Opticians.

By virtue of his merchandising function the optician ordinarily advertises his services and the goods he has for

sale by various advertising media (R. 146, 167, 211-212, 216, 377). In the opinion of Doctors Coston, Cordes, Braley and Lemoine truthful advertising by opticians is not detrimental to the public health and welfare (R. 109, 305, 365, 377).

Functions of the Optometrist.

The optometrist is a person trained in the measurement of the refractive errors of the human eye. In Oklahoma the practice of optometry is defined as

> "* * * The science and art of examining the human eye and the correcting or relief of ocular abnormalities by the employment of any means, including the use or furnishing of any self-testing device, other than the use of drugs, for the measurement of the powers of vision and the adaptation of lenses or prisms for the aid thereof" (59 Okla., St. Ann. §581).

In addition to measuring the refractive error in the human eye, practically all optometrists, unlike most ophthalmologists, sell the eyeglasses prescribed by them (R. 42, 133, 158, 252-253, 411).[13] Between sixty and seventy

[13]The combination in the optometrist of the statutory professional service of refracting eyes and the craftsman-mercantile functions of the optician has been recognized in state sales tax litigation. See *Rice* v. *Evatt*, 144 Ohio St. 483, 59 N. E. 2d 928-929; "The work of grinding lenses and of adjusting frames and fitting them to the face is not professional in character. All such work may be done by an optician. Though optometry is a limited statutory profession, the only professional service that the optometrist performs is 'the application of optical principles, through technical methods and devices in the examination of human eyes for the purpose of ascertaining departures from the normal measuring their functional powers and adapting optical accessories for the aid thereof.' * * * The furnishing of optical accessories by an optometrist to his patient for a consideration is not a professional act and is a sale as defined by statute. * * * There is no doubt that the transactions had a professional aspect in one of the phases and involved sales only for which no separate charges were made. The proportion which the cost of materials bore to the total charge (about one to three) does not indicate that sales were an inconsequential element. Nor were the sales merely incidental to professional services. In a transaction of that kind, sales and services are distinct. The vendee may get his prescription from an optometrist and his spectacles,

per cent of the corrective eyeglasses sold in the State of Oklahoma and the other states of the Union are sold by optometrists (R. 144, 166). Almost invariably optometrists in Oklahoma and elsewhere refuse to give their patients prescriptions for eyeglasses which may be filled by opticians of the patients' choosing but rather insist that they obtain the eyeglasses from the prescribing optometrist and let him fit and adjust those eyeglasses to the face (R. 133, 158, 253).[14] Such is one of the basic tenets of the profession of optometry (R. 259-260). As a direct consequence of this almost uniform practice, the business of the dispensing optician comes from ophthalmologists' prescriptions and members of the general public who desire either duplicate eyeglasses, replacement lenses, new frames or repairs to existing eyeglasses (R. 133, 158). As a corollary of this custom the major portion of the optometrists' net income —in some instances as high as 100 per cent[15]—is derived not from his services in refracting eyes but rather from the profits realized on the sale of the eyeglasses, frames and lenses dispensed after refraction (R. 134, 160). In all that he does except for refracting eyes and examining

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with lenses ground according to the prescription, from an optician. When the individual vendee gets both from an optometrist, in the same transaction, their distinct character persists and the furnishing or sale of each is a consequential element. Furnishing optical accessories for a consideration by the optometrist upon his own prescription is a professional transaction, only insofar as the prescription is concerned and therefore can never become professional to such an extent as to involve sales as inconsequential elements."; *Commonwealth* v. *Miller*, 337 Pa. 246, 11 A. 2d 141, 142-143; "There is no escape from the conclusion that appellant is liable for payment of the mercantile license tax on his business as a retail vendor. The sale of glasses properly belongs to the occupation of an optician and is not necessary to the practice of the profession of optometry"; compare, *Babcock* v. *Nudelman*, 367 Ill. 626, 12 N. E. 2d 635. But *cf. American Optical Company* v. *Nudelman*, 370 Ill. 627, 19 N. E. 2d 582. See also, brief of the American Optometric Association, *amicus curiae*, page 2.

[14] See also, brief of American Optometric Association as *amicus curiae*, p. 2.

[15] For example, in those cases where optometrists advertise "eyes examined free" (R. 160).

them for the existence of some pathological condition, the optometrist is in reality acting as an optician (R. 429).

In keeping with the predominant merchandising aspect of their practice, the majority of optometrists in Oklahoma have their offices in downtown or suburban retail business districts at ground floor levels. Such is also true of the rest of the United States (R. 134-135, 166-167, 254). Optometrists in Oklahoma and elsewhere almost uniformly make just one charge for their services and functions, i. e., refracting eyes and selling eyeglasses (R. 133-134). The average examination fee of Oklahoma optometrists where no glasses are prescribed is about $5. Yet the general "one amount" charge of Oklahoma optometrists for examination, eyeglasses, fitting and adjusting where the completed eyeglasses dispensed cost the optometrist approximately $8, is from $25 to $30 (R. 134).

While farsighted leaders in the field of optometry are today urging that optometrists forsake the commercial aspect of their practice by eliminating merchandising practices, the realization of this program remains for future development (R. 279-280, 410-412). In fact, the establishment of a purely professional practice envisaged by such leaders in optometry will result, if attained, in the opening of broader fields of service by opticians and consequently enhances the urgency of preserving this vocation as a separate qualified craft (R. 410-412; 429).

Rental of space.

The portion of Section 4 (59 Okla. St. Ann., §944) involved in No. 184 is that prohibiting any person, firm or corporation engaged in the business of retailing merchandise to the general public from renting space, subleasing departments or otherwise permitting any person purporting to do eye examination or visual care to occupy space

in such retail store. Plaintiff Oran Rips is an Oklahoma licensed physician (R. 199). He occupies office space on the balcony of the Zales Jewelry Store in Tulsa, Oklahoma, under a written lease from the Zales Jewelry Company, expiring March 31, 1956 (Pltffs.' Ex. 22; R. 14-15, 200). Under date of September 1, 1953, defendant Zales Jewelry Company notified Dr. Rips that his lease was being terminated effective September 4, 1953, because of House Bill No. 953 (Pltffs.' Ex. 23; R. 17-18, 200). Dr. Rips testified that the value of the lease to him was $25,000 (R. 200). The court below found that such portion of Section 4 was unconstitutional and, therefore, enjoined the defendant, Zales Jewelry Company, from canceling or terminating its lease to plaintiff Rips upon the ground that it was in violation of Section 4 of House Bill No. 953 (R. 28-29).

Effects of House Bill No. 953.

The undisputed record evidence clearly establishes that optometrists in Oklahoma and elsewhere are in direct competition with opticians in the sale of eyeglasses, frames and lenses, and because of their economic dependence upon the sale of those articles, the merchandising interests of the optometrist play a dominant part in the establishment of their professional objectives and activities. House Bill No. 953 has the following effects on all Oklahoma opticians:

1. It prevents them from fitting, adjusting or adapting or in any manner applying lenses, frames, prisms or other optical appliances to the faces of persons without a prescription on file from an Oklahoma optometrist or ophthalmologist. Thus, unless a prescription is on file, opticians are prevented from:

(a) inserting a customer's old lenses into a new frame;

(b) making duplicate eyeglasses or replacement lenses, and

(c) selling new frames for existing or replacement lenses;

2. It prohibits them from advertising by any means whatsoever their calling, merchandise and services;

3. It prohibits them from filling or duplicating prescriptions of out-of-state ophthalmologists, and

4. It subjects them to the criminal sanctions and in addition, the injunctive provisions of Section 6 upon the filing of a verified complaint with a county attorney.[16]

As a direct and natural consequence of the above prohibitions and the fact that between 60 per cent and 70 per cent of the prescription eyeglasses sold in the nation are sold by optometrists who will not issue prescriptions opticians will be deprived of a major part of their lawful calling including at least 50 per cent of their business in

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[16]As the court below found "' ' ' plaintiffs' allegations, together with the undisputed proof, indicate that immediate and unrelenting enforcement of all the provisions of this Act, provisions clear in meaning and intent, by the defendant State officers, is imminent; in fact, defendants' counterclaim in this suit specifically demands injunctive relief against the plaintiffs as authorized by Section 6 of the instant Act. The inevitable result of the enforcement of the provisions found by this Court unconstitutional in points I and II of the Opinion, as applied to the two dispensing optician plantiffs, will be to literally put said plaintiffs out of business; unquestionably, from such an injury there can be no adequate remedy at law and that such will result is not conjectural but positive. The effect of the enforcement of the Act on the unconstitutional feature discussed in point III of the Opinion, as applied to plaintiff, Dr. Rips, although not resulting in putting Dr. Rips clear out of business, will be to compel said plaintiff to relinquish a very desirable and valuable lease and to move to another place of business. Insofar as all plaintiffs are concerned no adequate remedy is available; the State cannot be held responsible for the business loss of the two dispensing optician plaintiffs or the loss of a lease by plaintiff Rips, valued at more than $5000; and, certainly a lessor cannot be held responsible for cancelling a lease in conformity with a state criminal law requirement (notice of cancellation of which has already been given).

"' ' ' What facts could more pointedly justify the exercise of equitable authority than these—where the plaintiffs are faced with both an injunctive prohibition and a liability for multiple criminal prosecutions. ' ' '" (R. 61-63). *Toomer* v. *Witsell*, 334 U. S. 385, 391-392; *Russo* v. *Reed*, 93 F. Supp. 554, 558 (S. D. Me., 1950); *cf. Terrace* v. *Thompson*, 263 U. S. 197, 214.

the sale of frames which, in turn, represents approximately 70 per cent of the average optician's total business (R. 196-198, 206), and by far the greatest part of the optician's lost business will fall to optometrists who in filling that business will be acting as opticians (R. 45). It would "break" most dispensing opticians if they could not sell frames, replacement lenses and duplicate eyeglasses without prescription because such represents forty to fifty per cent of their business (R. 166).

Another direct effect of the prohibitions will be an ever increasing hampering of the ophthalmologist in his practice by reason of the elimination from business of many qualified opticians—the ophthalmologists' "right arm"—thus resulting in the ophthalmologist being able to examine fewer people and the diversion of more and more people with eye defects from ophthalmologists to the optometrists, the latter being neither authorized nor trained to treat pathological conditions of the eye or to perform eye surgery. Yet another effect will be the withdrawal from the public of all forms of legitimate advertising by which it is enabled to know who sells eyeglasses, frames and lenses and who may fill its prescriptions with the result that the optician is impeded in his ability to secure business which will otherwise, purely by the operation of statistical percentages, fall to the optometrist; and the public will be deprived of all means of knowledge respecting the cost and kinds of optical goods which are available to it.

The Act also prohibits Oklahoma opticians from filling prescriptions for eyeglasses written by ophthalmologists or optometrists residing in other states of the Union. This, according to Dr. Coston, is also not in the best interests of the public (R. 101).

SUMMARY OF ARGUMENT.

Plaintiffs contend that the court below did not err in holding that portions of Sections 2, 3 and 4 of Oklahoma House Bill No. 953 (59 Okla. St. Ann., §§942-944) were void under the Federal Constitution and the XIV Amendment thereto. They also contend that those portions of Section 3 prohibiting the advertising of eyeglasses, lenses and prisms are unconstitutional and that the court below erred in failing to so hold.

I.

The district court properly held that Section 2 violated the "due process" and "equal protection" clauses of the XIV Amendment in prohibiting dispensing opticians from (a) fitting, adjusting, adapting or in any manner applying lenses, frames, prisms or other optical appliances *to the face* of a person, and (b) duplicating or attempting to duplicate, or placing or replacing into frames, lenses or other optical appliances that have been prescribed, fitted or adjusted for visual correction except upon the written prescriptive authority of Oklahoma licensed ophthalmologists or optometrists. The optician is fully competent to perform these functions which he has customarily rendered for hundreds of years. Such functions are those of a skilled craftsman or artisan, do not rise to the plane of professional endeavor, and do not require the education or training similar to that required of the ophthalmologist or optometrist. The prohibition of Section 2 has no real, substantial relation to the public health, morals or welfare because the ophthalmologist is less skilled and able, and the optometrist no more skilled, than the optician in the performance of these services. Even if

it be assumed that an optician could make an error in fitting or adjusting eyeglasses to the face or in duplicating lenses, no harm or injury would result to the eyeglass wearer. Moreover, the optician is a most important auxiliary to the present day ophthalmologist and relieves the latter of skilled craftsman and mercantile functions for which the ophthalmologist, in the proper practice of his profession, has neither the time nor training. The practice of ophthalmology requires the optician for only by the optician's complementing with his skilled craftsman and mercantile functions the ophthalmologist's professional knowledge, skill and training, can complete visual care be given the public.

The direct effect of Section 2 is to transfer from the optician to the optometrist a large and profitable portion of the former's business and to such an extent that the optician will cease to exist. Section 2 contains no regulations or standards for opticians but rather is a discriminatory statute that arbitrarily takes from the optician a major portion of his lawful business.

Roschen v. *Ward,* 279 U. S. 337, is not determinative of this case because (1) it was there admitted that a regulation of the sale of eyeglasses, insofar as it might require an examination and fitting of the eyes of the purchaser, was within the state's police power; (2) the merit of professional examination of the eyes at the time of the sale of original eyeglasses is not an issue here, and (3) the "constitutional facts" as established in this case by the uncontradictable testimony of some of the nation's foremost ophthalmologists that the fitting, adjusting and adapting of eyeglasses and frames to the face, and the duplicating of lenses or complete eyeglasses by opticians is not harmful or detrimental to the public health and welfare were not present in *Roschen* v. *Ward.*

Section 2 is also an unconstitutional delegation to ophthalmologists and optometrists of the right to determine who shall do business as a dispensing optician in the State of Oklahoma. No standards or qualifications for opticians are included, and the effect of the statute is to give ophthalmologists and optometrists unbridled discretion to determine the number of and persons who may engage in business as opticians. The inevitable result, therefore, is that such authority may be exercised arbitrarily, capriciously and without uniformity. On the other hand, if Oklahoma considers it desirable to establish standards for and to regulate the practice of opticianry, it may lawfully do so by direct legislation that will not have the effect of taking away the optician's business and giving it to the optometrist or of delegating to private individuals the power to determine who may act as opticians.

By its exemption of the sale of ready-made glasses containing convexspherical lenses[11] from the operation of the Act, the Oklahoma Legislature has denied opticians the equal protection of the laws guaranteed them by the XIV Amendment. There is, in fact, no real difference so far as the public health and welfare are concerned, between the fitting, adjusting and adapting to the face or the duplication of eyeglasses containing all types of lenses and the over-the-counter sale of ready-made eyeglasses containing only convexspherical lenses.

II.

The court below correctly held that the prohibition of Section 3 against advertising the sale of frames, mountings and other optical appliances is unconstitutional, but erred in upholding that prohibition with respect to com-

[11]Convexspherical lenses are only magnifying lenses (R. 81, 100-101, 193).

pleted eyeglasses, lenses and prisms. The right to truthfully advertise merchandise and craftsman services is a property right protected by law, and a state may not, under the guise of a police power measure, arbitrarily interfere with a lawful calling or impose unreasonable and unnecessary restrictions upon it. Section 3 is not a statute imposing reasonable regulations upon the right to advertise eyeglasses, frames and lenses, but rather is a complete prohibition of all advertising of those articles of merchandise by every media and by all persons. In so doing the statute violates due process and unreasonably burdens and restrains interstate commerce contrary to Article I, Section 8, of the Federal Constitution.

The advertising prohibition of Section 3 also violates the "equal protection" clause of the XIV Amendment because it does not apply to the sale of ready-made eyeglasses and in addition, Section 736.1, 59 Okla. St. Ann. permits the advertising of other similar prosthetic devices such as hearing aids and trusses.

III.

The court below did not err in holding unconstitutional that portion of Section 4 prohibiting any person, firm or corporation engaged in retailing merchandise from renting space in a retail store to a person purporting to do eye examination or visual care. Such provision has no relation to the manner in which an ophthalmologist or optometrist will perform his professional duties and, therefore, does not promote the public health or welfare. The measure cannot be sustained upon the ground that it prevents "corporate practice" because such practice is already forbidden in Oklahoma by statutes that can be enforced effectively by the officers of that state. It is not reasonable or necessary to outlaw perfectly valid legal

ationships merely on the suspicion that a third party's fit motive may influence an opeometrist or ophthalologist having his office in a retail store in the discharge his professional duties. As long as the State of Oklama permits optometry to retain its mercantile functions, strictions against the location of an ophthalmologist's optometrist's office will not eliminate or minimize ommercial" considerations in the prescription of eyeasses. The measure is an unwarranted restriction upon e use of private property and also impairs the obligan of existing lease contracts contrary to Article I, Secn 10, of the Federal Constitution.

IV.

The court below erred in excluding plaintiffs' offered xhibit 2 (R. 459, 220, 265) because that exhibit was comtent, material and relevant to show the conditions and ecial facts existing at and before the enactment of ouse Bill No. 953.

ARGUMENT.

I.

Section 2 of House Bill No. 953 is unconstitutional because it deprives plaintiffs and persons similarly situated of the right to conduct essential functions of a recognized vocation in violation of the XIV Amendment to the Constitution of the United States.

A. Section 2 deprives plaintiffs and persons similiarly situated of the right independently to perform recognized functions of their craft when such deprivation has no reasonable relation to the public health and welfare of the people of the State of Oklahoma.

The court below unanimously[18] found that those portions of Section 2 that prohibit anyone not an Oklahoma licensed ophthalmologist or optometrist from fitting and adjusting lenses, frames, prisms or other optical appliances to the face of a person, duplicating lenses and complete eyeglasses, and from placing or replacing lenses into eyeglass frames except upon the written prescription (or its duplicate) of an Oklahoma ophthalmologist or optometrist violated the "due process" and "equal protection" clauses of the Constitution of the United States (R. 44-53; 62-64;

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[18]Judge Murrah had no misgivings as to the unconstitutionality of Section 2. In his separate opinion he said:

> "The obvious result of this legislation is to appropriate a property right of one class to follow a legitimate calling or occupation and to give it to another class not shown to be more competent in the public interest. Indeed, the evidence shows that it would be inimical to the public interest to require the wearer of eye glasses to return to the ophthalmologist in order to obtain a prescription for the replacement or duplication of an eye glass, or to place the burden upon the ophthalmologist of merchandising frames and mountings and other appliances, or placing that purely commercial monopoly in the optometrist. There is no rational basis for depriving the optician of the right to perform this purely mechanical and commercial service to the public.
>
> . . . . . .
>
> "* * * As to Section 2, while I have some misgivings about injunctive relief, I am clear on the issue of constitutionality" (R. 63-64, 68).

68). It found from uncontradicted evidence that the optician was fully competent—in fact, more competent than the ophthalmologist and, at least equally as competent as the optometrist—to perform those functions (R. 47, 48, 63-64). Yet under Section 2, the optician would be deprived of the right to perform those lawful functions and that right would be, by the inevitable operation of economic facts, transferred to optometrists (R. 49, 63).

The principles of constitutional law applicable to this case are clear and undisputed. The real controversy is whether the "constitutional facts" established in the record and found by the district court bring the case under the line of authority typified by *Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, or that represented by *Liggett Company* v. *Baldridge*, 278 U. S. 105. Whatever may be the status of the precise language and holding in the *Liggett* case after this Court's decision in *Lincoln Federal Labor Union* v. *Northwestern I & M Co.*, 335 U. S. 525, and the *Daniel* case,[19] there can be no question but that the Federal Constitution limits the power of a state acting under the guise of an exercise of the police power to deprive a whole craft of its right to work and to confiscate that craft's business for the benefit of others when, in fact, such action bears no reasonable relation to the public health and welfare. The issue in this case is not one of basic constitutional principles, but rather the issue is to determine within which of acknowledged constitutional principles the present factual situation falls. This issue cannot be resolved by an abstract consideration and discussion *in vacuo* of the constitutional principles announced in the *Lincoln Federal* and *Daniel* cases or in *Roschen* v. *Ward*, 279 U. S. 337. Judicial precedents establish principles, but they do not establish facts.

[19] See, Brief for American Optometric Association, Inc., as *amicus curiae*, pp. 10-14.

The issue here can be determined only by coming squarely to grips with the evidence before the Court upon the factual question[20] of whether the statute involved actually bears any reasonable relation to the promotion of the health and welfare of the people of Oklahoma. If it does, the statute is constitutional; if it does not, then plaintiffs are being deprived of their right to pursue a lawful calling in violation of the "due process" clause of the Federal Constitution.

The court below forthrightly met this factual issue and on the basis of uncontradicted evidence found that no interest of the public was served by limiting the traditional scope of the work of dispensing opticians by legislation which had the effect of transferring their work to persons less qualified to do that work, and whose qualifications and training in eye examinations and eye treatment had no relation in fact to the craftsman-like performance of the dispensing optician's artisan and merchandising functions. If the court below did not dwell at length upon judicial precedent, it was only because no such precedent could substitute in the task before it for the extensive and convincing medical and technical evidence upon which it was justified, and required, to place its reliance.

The medical evidence in this case comes from preeminent ophthalmologists—the foremost in the country—and is uncontradicted and unimpeachable. Their testimony establishes that the optician is fully competent to perform his customary functions in a manner entirely consistent with and in the best interest of the health and welfare of the public.

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[20] See *Borden's Farm Products* v. *Baldwin*, 293 U. S. 194; *Hammond* v. *Scheppi Bus Lines*, 275 U. S. 164; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543.

In urging that the court below erred in striking down Section 2, defendants[21] rely primarily on *Kresge* v. *Ottinger*, 29 F. 2d 762 (S. D. N. Y., 1928), and the decision of this Court affirming, *sub nomine Roschen* v. *Ward*, 279 U. S. 337; *Commonwealth* v. *Kresge Co.*, 267 Mass. 145, 166 N. E. 558; *Sage-Allen Co.* v. *Wheeler*, 119 Conn. 667, 179 Atl. 195; *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S. E. 2d 210, and *City of Springfield* v. *Hurst*, 144 Ohio. St. 49, 56 N. E. 2d 185. Those cases are not determinative of the issues here for they fall within one of two classes, i.e., cases upholding the regulation of over-the-counter sales of ready-made glasses or cases dealing with some phase of the advertising of eyeglasses.

All of the above cases apparently rely heavily for their result on the opinion in *Kresge* v. *Ottinger* and on Mr. Justice Holmes' opinion in the appeal of that case. Since the subsequent authorities and defendants rely so much upon the opinion in *Roschen* v. *Ward*, it is appropriate to ascertain precisely what was decided in that case. In the district court opinion written by Judge Augustus N. Hand, the court refused to enjoin the enforcement against the Kresge stores of a New York statute that prohibited the sale of eyeglasses, spectacles and lenses for the correction of vision unless a duly licensed physician or optometrist was in charge of and in personal attendance at the booth or counter where such articles were sold. The statute expressly excepted from its application eyeglasses sold by licensed physicians or optometrists, the sale of goggles containing plano lenses, opticians selling eyeglasses on prescription, and *also the duplication of broken glasses*. The only issue before the court in the *Roschen* case was the application of the statute to over-the-counter

[21] As does the American Optometric Association in its *amicus curiae* brief.

sales of ready-to-wear glasses by such concerns as the Kresge stores.

Though evidence was submitted to the court disclosing the refractive principles applied in eye examinations which were likely to produce a more accurate correction of the patient's eye defect than self selection, it is clear from the opinion of the district court that there was no evidence before the court of the effect upon the wearer of an error either in his selection of ready-to-wear eyeglasses or in the filling of a prescription for eyeglasses containing other than convexspherical lenses. In fact, at the argument of the case it was conceded (29 F. 2d 765) that a statute regulating the sale of eyeglasses so as to require examination and fitting of the eyes of purchasers of spectacles, was a proper sphere for exercise of the police power. The objection made to the New York statute was not that the state had no authority to prohibit sale without examination, *but rather that the regulation attempted was invalid because it did not require the optometrist placed in charge of the sales location to examine or prescribe, and that, therefore, the measure afforded no protection to the public.* It was on this latter ground that Judge Hand upheld the statutory regulation upon the admission of the parties that the sale of eyeglasses could validly be regulated under the police power.

Furthermore, in evaluating the decisions in the *Roschen* case, it must always be borne in mind that what was there being considered was, as stated by Judge Hand (p. 764) "• • • the existing evils of haphazard selection of eyeglasses • • •" in over-the-counter sales of ready-made eyeglasses, and the decision only sustained the constitutionality of a requirement of professional attendance at counters of firms selling ready-made eyeglasses. The constitutionality of applying such a requirement to a dispensing optician handling or duplicating prescription eye-

glasses was not before the court or in the court's mind. In fact, as Justice Hand stated, p. 764:

> "* * * If the effect of the new requirement should finally be to render the sale of a standardized product unprofitable so that the customers in the end would not purchase it but would have their eyes carefully tested and their glasses made according to special prescriptions it cannot be said that the result might not on the whole be desirable * * *."

It is obviously a very different question to require, in effect, that people who already have obtained the special prescriptions which Judge Hand found desirable must, against their wishes and needs and against common sense, again obtain that prescription before obtaining duplicate eyeglasses or lenses. Further, it is a very different thing to require people who have already obtained such special prescriptions for lenses to obtain a duplicate copy of such prescription before they may purchase a new frame when in the first instance the frame is neither specified by nor the subject dealt with in the prescription. Finally, it clearly does not follow that the same constitutional considerations germane to the regulation of customers' selection of their own eyeglasses at a dime store counter control restrictions upon the trained and skilled services performed by the dispensing optician. It is apparent that the opinions in the *Roschen* case, both in the lower court and in this Court, go no further than to hold that, *where it is conceded by the parties that a regulation requiring examination and fitting of eyes of purchasers of spectacles at the time of the sale of original eyeglasses is a proper exercise of the police power*, a state statute requiring that an optometrist be present at the place of sale is not invalid as to vendors of ready-made eyeglasses for the reason that it does not also require him to make an examination.

The limited holding of the *Roschen* case was apparently extended, however, in *Commonwealth* v. *Kresge Co.*, *supra*, in which the Kresge Company was indicted under a Massachusetts statute for allegedly unlawfully practicing optometry. Again, as in the *Roschen* case, the question before the court was the constitutionality of regulating (actually prohibiting) the sale of ready-to-wear eyeglasses and the court stated, p. 560:

> "It seems to us not open to serious debate that it is within legislative competence to determine that scientific and trained adjustment of eyeglasses and of the lenses of which they are made, to the particular organs of vision of each individual, will be likely to effect a more complete and healthful correction of poor eyesight than the untrained and unaided selection by the customer himself from a mass of eyeglasses. * * *"

Clearly the court was addressing itself solely to the comparative benefits of professional prescription as against customer selection—the advantages of the trained over the untrained. Accordingly, the philosophy of the court is entirely inapplicable to the constitutionality of substantial restrictions upon the dispensing activities of opticians who, under the evidence in this case, are shown to be of equal, if not greater, competence and skill in their task than the optometrist or ophthalmologist. Furthermore, it is not clear from the statute, or from the opinion of the court, whether the regulation involved was applicable to the duplication of prescription eyeglasses or lenses. But the statement of the court, that it was dealing with a statute regulating "the untrained, unscientific *treatment* of the eyes" indicates that the court was of the opinion that the statute was directed solely to the benefits of prescription eyeglasses over ready-made eyeglasses

Obviously such broad holdings have little relation to the rather refined issues between skilled branches of the field of eye care presented by this case.

The cases of *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S. E. 2d 210, and *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 56 N. E. 2d 185, cited by defendants (pp. 28, 30), merely set forth the proposition that there is sufficient relationship between the sale of eyeglasses and the public health and welfare to warrant a police measure regulating certain specific types of advertising. To the extent that the court in the *Hurst* case relied upon the *Roschen* and *Commonwealth* v. *Kresge Co.* cases for the proposition that a state may regulate "if not prohibit altogether" the sale of eyeglasses by a retail vendor, the court clearly was referring only to the holdings of those cases with respect to sales of ready-made glasses. Nothing in the language or theory of either of these cases bears upon the constitutionality of restricting the traditional functions of a dispensing optician dealing only with prescription eyeglasses.

Defendants contend in their brief (pp. 31, 33) that the decision of the Oklahoma Legislature that a dispensing optician must have a prescription in his shop before duplicating eyeglasses or lenses or replacing frames does not affect "the ethical optician" but only "the commercial optician." Certainly such statement is flatly contradicted by all of the evidence in this record.[22] The uncontradicted testimony of Mr. Hill and Mr. Barber, a member and a national officer, respectively, of the Guild of Prescription Opticians, which under no stretch of the imagination may be termed an association of unethical or commercial opticians, is flatly to the contrary (R. 144-145, 166).

[22] See, for example, the intervening petition of the Oklahoma Dispensing Opticians Association included in the supplemental transcript filed with the clerk of this Court, but not designated for printing.

Defendants have assembled in their brief eleven statements of purported merit to the requirement that a prescription be on file with the optician before he duplicates eyeglasses or lenses or replaces frames. Probably the best answer to this accumulation of isolated bits of medical trivia credulously gleaned from the expert evidence is that furnished by Dr. Coston in response to defendants' questions regarding Item 4 of this list:

> "I don't assume anything about it. If he is satisfied with the glasses, he has them duplicated. If he isn't, he isn't going to have them duplicated. If it's off axis and it's causing him no symptoms, he doesn't know it's off axis, he can have them duplicated and wear them and there is no harm done.
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> "It would not be according to my prescription, no. * * * I think that sometimes we get mixed up in technical things too much. The aim of a proper refraction is first of all to have the best vision that the glasses will give the patient, plus comfort. Now if the glasses are fitted improperly, and a number of times that will be true, because the patient subjectively didn't give you the proper answers, or maybe the doctor was a little careless that morning, but if he gets the glasses and he sees well, and he has no discomfort, suppose that a mistake had been made somewhere, it is of no importance * * *" (R. 113).

When the eleven "reasons" are analyzed, it appears that actually 3 and 9 are duplicates and that 3, 4, 5, 6, 8, 9 and 10 all resolve themselves into the same basic proposition --that an error could conceivably be made in duplication of a lens by a lensometer. Notwithstanding that possibility, the medical testimony shows that no harm could result. Moreover, the fact that an error could conceivably be made is not an "evil" peculiar to opticians, but rather a frailty to which all mankind is subject. In fact, the evidence estab-

ishes that such an error is far less likely to occur in luplication or fitting and adjusting by an optician because ıe is more competent to do that work than the ophthalnologist and equally as competent, if not more so, than he optometrist. Furthermore, the testimony is that in hose cases where a patient returns to the ophthalmologist, he conformity of the lens dispensed with the lens preeribed is usually determined by the doctor's technician or nurse by the use of the lensometer (R. 96, 240, 243).

Considering separately each of the eleven "reasons," he following appears:

Reason 1. The record references fail to support the assertion that the eye-lens distance and angle of the lens o the eye cannot be ascertained by the optician from the glasses alone. The eye-lens distance can be measured with he micrometer-like instrument demonstrated by Mr. Hill t record page 122. Furthermore, the data concerning the ye-lens distance included in the ophthalmologist's preeription is that between the patient's eye and the lens n the trial case used at the time of examination (R. 92, 37). This information is not intended to prescribe the eyeens distance in the completed eyeglasses, but rather is a eference point from which the optician can compute, by tandard mathematical tables, the power of the lenses reuired in the completed eyeglasses when the eye-lens istance is different from that at which the examination as made. If the optician can't place the lens in the completed eyeglasses at the examination distance, which freuently is the case, he compensates for such variation in istance by computing the power of the lenses to be used the different distance to give an equivalent correction R. 92, 237). Equally significant is the testimony of Dr. emoine that the eye to lens distance for completed eyelasses cannot be stated in the prescription but rather can

only be determined after the frame is selected and tried on the patient's face (R. 384).

Reason 2. Dr. Braley's testimony at page 339 is the sole support for this alleged valid "reason" for prohibiting duplication in the interests of the public welfare. It utterly fails to support the conclusion drawn by the defendants. Instead, Dr. Braley testified that the ophthalmologist's prescription contained only the type or power of lens required except occasionally when the type of frame or glass might be included as, for example, in a post-operative cataract prescription where certain different kinds of glass might fill the prescription better (R. 339). He went on to state "that doesn't necessarily mean that the patient will order those or want to buy that particular kind of glass" (R. 339).

Reason 3. Admittedly, there is the *possibility* of human error in lensometer duplication, but as pointed out before (page 37), there is less likelihood of that error when the duplication is done by the optician because he is the most competent person in the field to perform duplications. It is equally obvious that duplication from a prescription is no absolute guarantee against error.[23] In fact, Dr. Coston testified that in duplication by a lensometer, an optician can duplicate more accurately than could be done under a new examination because the results of the examination depend in part on subjective answers (R. 111). Duplications by a lensometer alone result in lenses within the accepted limits of tolerance (R. 111).

Reasons 4 and 5. Essentially the same reply as in 3 above is applicable here. In addition, it should be remembered that duplication in such circumstances would give the wearer exactly the same glasses he had been using comfortably and satisfactorily before.

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[23]For example, a mistake in reading the ophthalomologist's handwriting like that described by Dr. Lemoine may occur (R. 383).

Reason 6. The uncontradicted testimony is that opticians do not and will not duplicate from an insufficient fragment (R. 142, 171, 348). Of course, if one desires to conjecture, duplication from an insufficient fragment *might* result in a lens of different characteristics than the original, but even then wearing such a lens would not harm the patient (R. 108, 378). Furthermore, there is nothing in the ordinary prescription about *adapting* eyeglasses to the face. If the State desires further assurance against malpractice by opticians as to this point, it may certainly regulate their activities and prohibit improper duplication from inadequate fragments by appropriate legislation.

Reason 7. The record citation here does not support the conclusion asserted. Patently, a prescription would indicate the date the examination was made, but that wouldn't necessarily be the *last* examination the patient had undergone. Moreover, Section 2 does not require an eye examination at stated intervals[24] or at any time for that matter, and under its terms duplications could be made from a single prescription in the optician's file for the lifetime of the wearer, if the wearer so chose. It is difficult to see, therefore, how this purported reason has any relation to the public health.

Reason 8. True, the lensometer, as any other precision instrument, *can conceivably* get out of adjustment, but for that matter, so can the optometrist's phoropter. However, as pointed out by Mr. Barber (R. 170), lensometers don't get out of adjustment unless they are seriously abused or damaged. And the fact remains, that the lensometer is admittedly the most accurate instrument made for checking the powers of lenses (R. 259).

[24]Dr. Lemoine stated that the need for the frequency of eye examination varies with the patient and with age. From age seven to forty-five, ten years between examinations is all right (R. 387).

Reason 9. This is a complete reiteration of "Reason 2" and simply states the same obvious thing in another manner.

Reason 10. Conceivably, repeated duplications, each within accepted tolerances, could result ultimately, by cumulating tolerances in one direction, in a lens differing from that originally prescribed but this "reason" is speculation of the rankest order. As Dr. Coston answered a question framed substantially in the same language as Reason 10:

> "It's conceivable, but if you want to speculate, the error might be one way or the other, and if he's fool enough to go twenty-five years buying glasses that way, all right, but it won't do him any harm" (R. 106).

Reason 11. While under some circumstances it may be preferable to have duplications made from a prescription, yet on the other hand, the informed medical testimony in this case is that duplication by a lensometer from glasses alone is the customary, accepted practice among ophthalmologists and opticians, and that it is in no way detrimental to the welfare of the eyeglass-wearing public and, in fact, is the sensible thing to do when a prescription is not available (R. 110-112, 386).

It is patent from the above analysis that the defendants' "eleven points"[25] amount to nothing more than an overrefined dissection of fragments of the medical testimony. Furthermore, they completely overlook the unanimous conclusion reached by the medical witnesses that qualified dispensing opticians are equally as competent, if not more competent, than optometrists or ophthalmologists to do all the things which this statute seeks to restrict their

[25]These same "points" appear in the *amici curiae* briefs of Kansas (pp. 23-24) and Arkansas (pp. 11-13).

doing and that all such functions are, in the opinion of such experts, a proper field for the dispensing optician.

The statement on page 29 of the American Optometric Association's brief that seventeen states have enacted legislation which specifically prohibits the duplication of ophthalmic lenses without a prescription from a licensed optometrist or ophthalmologist is inaccurate. For example, the North Carolina statute cited in the supporting footnote was held unconstitutional in *Palmer* v. *Smith*, 229 N. C. 612, 51 S. E. 2d 8, for its attempt to make the replacement or duplication of a lens or frame by an optician the practice of optometry. Five of the other state statutes cited—Maine, Montana, Nevada, Tennessee and Virginia—contain an exception providing in substance that nothing in those acts shall be construed to prevent an "optical mechanic" from performing the mechanical work of replacement or duplication of such ophthalmic lenses. In so far as the remaining state statutes cited in that footnote are concerned, it is submitted that they are unconstitutional for the same reasons as the North Carolina statute was held to be in the *Palmer* case.

In the very next sentence of its brief the American Optometric Association states that "twelve other states include in their definition of the profession of optometry the adapting, fitting, adjusting, applying or employment of frames, mountings or other optical appliances to correct errors of vision, and provide that this cannot be done by one not a licensed optometrist, except on prescription." Of the twelve states cited in the footnote, seven—California, Idaho, Louisiana, Maine, Oregon, Tennessee and Utah—are the same states referred to in the preceding sentence and footnote. Moreover, making the fitting, adjusting, adapting and applying of frames, mountings or other optical appliances to the face the *practice of op-*

tometry is precisely similar to what was attempted with respect to replacement and duplication by the North Carolina statute stricken down in the *Palmer* case. The mere fact that states have enacted the statutes cited in footnotes 13 and 14 and that they would fall under the decision of the court below is no valid reason for the American Optometric Association to urge, as it does, that the court below erred.

It is respectfully submitted that the entire record establishes without qualification that there just is no real, substantial relation between the prohibitions of Section 2 and the public health and welfare. That being true, Section 2 is in direct violation of the XIV Amendment to the Federal Constitution.

The basic underlying principles controlling this case were present in *Scully* v. *Hallihan*, 365 Ill. 185, 6 N. E. 2d 176, in which an injunction was sought by certain "drain layers" against the enforcement of the Illinois Plumbing Act of 1935. At the trial it was shown that the occupation of drain laying consisted of laying tile and other metallic piping for sanitary drainage systems. Until 1935 there had been a well-recognized distinction between plumbing and drain laying, but the Illinois Statute enacted in that year defined plumbing so as to include the work of drain laying and set up requirements for the licensing of plumbers that called for certain educational qualifications. In effect, the statute was an attempt by the Illinois Legislature to take from drain layers their right to engage in their traditional vocation and give that right exclusively to the plumbers. In holding the statute unconstitutional, the Supreme Court of Illinois said, pages 179-180:

> "It is one of the fundamentals of our democratic form of government that every citizen has the inalienable right to follow any legitimate trade, occupation,

or business which he sees fit. His labor is his property, entitled to the full and equal protection of the law under the due process clause of the Federal Constitution. It is also embraced within the constitutional provision guaranteeing to everyone liberty and the pursuit of happiness. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832. This right to pursue any trade or calling is subordinate to the right of the state to limit such freedom of action by statutory regulation where the public health, safety, or welfare of society may require. *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469. However, in those instances where the police power is invoked to regulate and supervise a legitimate occupation the restraint imposed must be reasonable. *The determination by the General Assembly that such regulations upon a trade are needful is not conclusive and is always subject to review. In order for such regulations to be lawfully imposed upon the constitutional rights of the citizen to pursue his trade or business, the act passed under the guise of a measure to protect the public health, comfort, or welfare must have a definite relation to the ends sought to be attained. Banghart* v. *Walsh*, 339 Ill. 132, 171 N. E .154.

"* * * The trade of a drain-layer is an independent trade, not requiring the scientific knowledge necessary to plan, devise, and install either a sewage, water or ventilating system in public buildings, nor that the laborer be educated in sanitary engineering. His is not the function of a sanitary engineer. *No citizen should be legislated out of his trade and have it awarded to another craft under the garb of a health measure where it is not definitely related to such measure.* This phase of the act of 1935 cannot be supported as a police power dealing with the health, welfare, safety, or comfort of the public. * * *" (Emphasis added.)

Here the vocation of an optician is an independent calling as was the trade of a drain layer in the *Scully* case. The optician does not require the scientific knowledge necessary to refract eyes and examine them for pathological conditions that is required of the ophthalmologist or the optometrist, nor is the optician educated in such matters because he does not undertake to do those things. Except for the conflict in the merchandising functions of both optician and optometrist, the optician does not have the functions of an optometrist. In fact, the optometrist is acting as an optician in all that he does except refraction and examination for pathological conditions. Consequently, the optician should not be legislated out of his calling and have it awarded to the optometrist under the garb of a health measure where the public health is not definitely related to such measure.

Similarly, *Banghart* v. *Walsh*, 339 Ill. 132, 171 N. E. 154, involved an Illinois statute that amended a previous statute regulating the business of barbers so as to require beauty shop operators to qualify as barbers before they could cut or trim hair. The plaintiffs had been engaged for a number of years previously as beauty shop operators in the course of which business they cut women's hair. Here again the effect of the new statute was to take from the beauty culturists the right to cut women's hair and transfer that business to barbers. In holding the act unconstitutional in so far as it applied to the beauty culturists, the court said, pp. 156-157:

> "* * * When the police power is exerted to regulate the conduct of a useful business or occupation, the legislature is not the sole judge of what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling and exercise his own judgment as to the manner of conducting it, but the measures adopted to protect the public health

and secure the public safety and welfare must have some relation to these proposed ends. *Ritchie* v. *People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315. For the same reasons that the barbers' law was held to be constitutional the occupation of beauty shop operators and beauty culturists may be the subject of regulation. Their occupation brings them in contact with the persons of their patrons, and their careless and unsanitary use and application of cosmetic preparations by means of devices, apparatus, or appliances, or bleaching, coloring, dyeing, or otherwise treating the hair, may injure their patrons or induce disease.* * *

* * * * * * *

"From Section 2 of the Beauty Culture Act and Section 18 of the Barbers' Act, it is apparent that the trades of a barber and a beauty culturists have many things in common in addition to the necessity for taking health precautions in the practice of both. By the bill it is shown that the cutting and trimming of hair is necessarily incident to the trade of a beauty culturist, and, of course, is necessary to the trade of a barber. Section 2 of the Beauty Culture Act has withdrawn hair cutting and trimming from the trade of beauty culture and given it to the trade of barber. Thus no beauty culturist can be authorized to practice her trade unless she is a barber, qualified by years of training to shave men and trim their beards. A period of 1,248 hours of study in a school or college of barbering and of two and a half years of service in a barber shop as an apprentice cannot be regarded as a necessary or reasonable requirement to qualify a beauty culturist to cut and trim hair. *The incidental part of the trade of beauty culture, consisting of cutting and trimming hair, is taken from that trade and given to the trade of barber under the guise of a police regulation, which can find no support as a reasonable measure either to preserve the health or to secure the safety, welfare, or comfort of society.* * *"

Yet another analogous case is *Moore* v. *Grillis*, 205 Miss. 865, 39 So. 2d 505, which dealt with a Mississippi statute amending a former statute relating to the licensing of certified public accountants in such manner as to provide that it should be unlawful for any person, except a certified public accountant who had complied with the requirements of the statute, or an attorney, or their employees, to charge or receive, directly or indirectly, any fee for making or preparing any tax return. The statute included a penalty by way of fine or imprisonment in the county jail. The appellants were not certified public accountants and were seeking to recover for services performed by them in preparing income tax returns. The Supreme Court of Mississippi held the statute unconstitutional, saying, pp. 509-510:

> "* * * As we have declared, if a statute purporting to protect public health, morals or safety, has no real relation to those objects, or is a palpable invasion of rights secured by fundamental law, courts must so adjudge and thereby give effect to the constitution. * * *
>
> "The whole ultimate effect of Section 8912 is to prohibit uncertified accountants, or preparers of tax returns, from earning a living thereat, or, at least from receiving compensation therefor. Counsel for appellee contends that is a mere regulation. Regulation, it seems to us, is one thing, but prohibition of doing a thing, thereby eliminating the practice to be regulated, is another thing entirely. It is a common right of the people, to enjoy 'Life, Liberty and the pursuit of Happiness,' and the right of the citizen of this state to employ whom they choose to make their tax returns, even though one so employed be not a certified public accountant, or attorney, is within those prerogatives of the people. The tax returns must be correctly prepared because they will be checked, and errors therein required to be corrected

by the tax officials, State or Federal, to whom the returns must be submitted. This would be true, whether the service of preparing the tax return were rendered by a certified public accountant, attorney, uncertified public accountant, or other persons. Certification of the accountant in making the return would possess no special sanctity there. *'Cu jusvis hominis est errare'* —any man may make a mistake. Cicero, Philippicae. No. xii, Sec. 2. and, Fabius Maximus long ago pointed out that it is beyond man's power to avoid all mistakes. Plutarch's Lives, Fabius, Ch. 13, Sec. 1. If such errors persistently occurred and recurred on the part of any person preparing such returns, with much frequency, this inefficiency would soon eliminate him from public demand in preparing tax returns, without the intervention of any state board. 'Liberty' within constitutional provisions against depriving any person thereof except by due process of law includes 'liberty of contract,' which, in turn, means freedom from arbitrary or unreasonable restraint. * * *''

To a similar effect are *Liggett Co.* v. *Baldrige,* 278 U. S. 105; *State* v. *Riedell,* 109 Okla. 35, 233 Pac. 684 and *New Jersey Used Car Trade Association* v. *Magee,* 1 N. J. Sup. 371, 61 A. 2d 751.

Also pertinent to the lack of any relation between Section 2 and the public welfare is *Palmer* v. *Smith,* 229 N. C. 612, 51 S. E. 2d 8. There the court had under consideration §90-115 of the General Statutes of North Carolina, which provided in part as follows, p. 10:

"* * * 'Within the meaning of this article, a person shall be deemed as practicing optometry who does, or attempts to, sell, furnish, *replace, or duplicate, a lens,* frame, or mounting, or furnishes any kind of material or apparatus for ophthalmic use, *without a written prescription from a person authorized under the laws of the State of North Carolina to practice optometry, or from a person authorized un-*

der the laws of North Carolina to practice medicine,' * * * ". (Emphasis added.)

Under that statute an injunction was sought against a dispensing optician enjoining him from selling or duplicating lenses or frames without a prescription from a licensed optometrist. The trial court refused to issue such an injunction upon the ground that the section quoted above violated Section 1 of the XIV Amendment to the Federal Constitution. On appeal the Supreme Court of North Carolina affirmed, holding that an optician cannot be forbidden to duplicate lenses or replace lenses into frames or mountings because the acts of duplicating lenses and replacing lenses into frames are mechanical and in practice are customarily done by opticians. In the course of its opinion the court said, pages 10-12:

"The sole question for determination on this appeal, is whether or not an optical mechanic is practicing optometry when he replaces or duplicates an ophthalmic lense, or replaces or duplicates the frame or mounting for such lense. * * *

* * * * * * *

"* * * The plaintiffs insist, however, that the duplication of an ophthalmic lense or the duplication or replacement of a frame or mounting for such lenses, constitutes the practice of optometry, and is not a mere mechanical operation or process which an optician has the right to perform.

"* * * 'Private business may not be regulated or converted into public business by legislative fiat.' 11 Am. Jur., p. 1060, Sec. 294. Moreover, the exercise of the police power will not be upheld where its use tends only to create a monopoly or special privilege and does not tend to preserve the public health, safety or welfare. *State* v. *Lockey*, 198 N. C. 551, 152 S. E. 693; *Georgia State Board of Examiners in Op-*

tometry v. *Friedmans' Jewelers, Inc.*, 183 Ga. 669, 189 S. E. 238; *People* v. *Griffith*, 280 Ill. 18, 117 N. E. 195; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 49 S. Ct. 57, 73 L. Ed. 204.

"It is undisputed on the record that a qualified optician can take a whole or broken lense and by the use of a vertometer or lensometer, duplicate such lense with accuracy and exactness. The process of duplication is conceded to be a purely mechanical one. • • •

• • • • • • • •

"We do not think the duplication of an ophthalmic lense or the duplication or replacement of a frame or mounting for such lenses, constitutes the practice of optometry as defined in G. S. §90-114. And what was said in *State* v. *Harris, supra* [216 N. C. 746, 6 S. E. 2d 866], applies with equal force to the factual situation here. There the court said: 'Obedience to the constitution on the part of the legislature is no more necessary to orderly government than the exercise of the power of the court in requiring it when the legislature inadvertently exceeds its limitations. "It has been frequently stated, in cases where the questions are presented for judicial review, that in order to sustain legislation under the police power, the courts must be able to see that its operation tends in some degree to prevent some offense or evil or to preserve public health, morals, safety, and welfare, and that if a statute discloses no such purpose, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the constitution." 11 Am. Jur., p. 1087, Section 306. In such a situation the duty of the court is clear.' "

To paraphrase the language of the *Palmer* case, this Court, in order to sustain Section 2 of House Bill No. 953 under the police power, must be able to see that the opera-

tion of that section tends in some degree to prevent some offense or evil or to preserve the public health and welfare. Here the evidence clearly establishes that no evil or harm can flow from opticians, without prescription, fitting, adjusting and duplicating eyeglasses and placing and replacing lenses into frames. Hence, the statute can have no real or substantial relation to the public health and welfare and is a palpable invasion of opticians' rights secured by fundamental law. Such being the case, the statute violates the XIV Amendment to the Federal Constitution.

In *Kindy Opticians, Inc.* v. *Michigan State Board of Examiners*, 291 Mich. 152, 289 N. W. 112, the trial court had enjoined plaintiff, a dispensing optician, from adjusting eyeglasses to persons by fitting, adapting, adjusting or bending their frames with or without lenses and from holding himself out to the public as being able to do so under a Michigan statute which purported to prohibit such acts except upon a written prescription from a licensed practitioner. The Supreme Court of Michigan dissolved the injunction and held that the act was not applicable to a dispensing optician because its title related only to optometrists. In so holding the court said, page 113:

> "The record is convincing that the business in which the plaintiff was engaged was that of a dispensing optician. The title of the act relates to optometrists only, and not to opticians. We must, therefore, hold that plaintiff was entitled to the relief sought, namely, a declaration by the court that its business, that of a dispensing optician, cannot be interfered with by the defendants, or any of them, while it is engaged in the lawful prosecution of its business."

Implicit in the decision of the Supreme Court of Michigan in the *Kindy* case is the finding that the fitting,

adapting, adjusting or bending of eyeglasses *to the face* of a person either with or without prescription does not constitute the practice of optometry. *A fortiori,* if an optician's fitting, adapting or adjusting of eyeglasses does not constitute the practice of optometry a state legislature cannot under the Federal Constitution enact legislation which by legislative fiat transposes that business from opticians to optometrists.

Under the authorities discussed above, Section 2 of House Bill No. 953 is unconstitutional because all the evidence introduced demonstrates that the fitting, adjusting and duplication of eyeglasses by opticians is not an "evil" and that the prohibitions contained in that section have no real and substantial relationship to the announced purpose of the act—the protection of the public's health and welfare.

B. Section 2 is unconstitutional because it delegates to ophthalmologists and optometrists the authority to determine who shall do business as a dispensing optician.

The exception to the flat prohibition of Section 2 is that the fitting, adjusting and adapting of lenses, frames, etc., and duplication of lenses and their insertion into frames may be done by an optical supplier "authorized"[26] to do so in the written prescription of an Oklahoma ophthalmologist or optometrist. The obvious effect of this proviso when considered in the light of the "responsibility" provision of Section 2 is to compel the ophthalmologist to

[26]This "authorization" as used in Section 2 and as interpreted by defendants is meaningless. Thus, all the optician needs to duplicate, fit and adjust, etc. without violating the law is a prescription containing only the power of the lenses. Without anything more he can duplicate, fit and adjust eyeglasses for as long as his customer desires. (R. 183-184). Section 2 does not, as stated by the American Optometric Association (Brief, p. 25) "* * * make the purchase of new frames or the duplication of old lenses the occasion for a professional eye examination by a licensed optometrist or ophthalmologist."

designate a specific optician to interpret his prescription. Thus, in answer to the question of whether he would permit his prescriptions to be taken by his patient to any optician that the patient might choose if Oklahoma law made him responsible for the glasses dispensed by the optician, Dr. Coston stated that he would not, and further said that in such event he would direct the patient to "an optician" whom he knew to be reputable and reliable (R. 100). As a matter of plain, common sense the ophthalmologist, under such circumstances, is going to direct his prescriptions to one or two named opticians for he cannot afford to assume responsibility for any optician his patient might choose anywhere in Oklahoma or in any of the other forty-eight states. Consequently, one effect of the "responsibility" portion of Section 2 is to delegate to ophthalmologists the power to determine who may act as dispensing opticians in Oklahoma without the legislature's having established any standards for the exercise of that power. Such a delegation is violative of both the due process and equal protection clauses of the XIV Amendment.

Moreover, the unrestricted authority attempted to be conferred upon ophthalmologists and optometrists by Section 2 cannot be sustained upon the ground that the public health and welfare requires opticians to be properly qualified to follow their calling. Plaintiffs concede that the State of Oklahoma has the power, if it so desires, to regulate and prescribe standards for opticians. But House Bill No. 953 is not a law providing standards or regulations for opticians. Rather, it is a law that deprives opticians of a substantial portion of their business, which deprived portion of the opticians' business is transferred to optometrists or else channeled into the hands of a few opticians who possess the favor of ophthalmologists. Ab-

solutely no criteria are set out in the statute to guide or control optometrists and ophthalmologists in determining what education, training or experience opticians should have to be qualified to perform their work, thereby creating a situation in which the right of one to practice as an optician is subjected to different, and constantly varying standards to be determined unilaterally by various private individuals.

In *People* v. *Brown*, 407 Ill. 565, 95 N. E. 2d 888, the Supreme Court of Illinois held unconstitutional a provision of the Illinois Plumbing License Law which had the effect of denying to citizens the right to become apprenticed plumbers, journeyman plumbers, or master plumbers unless a master plumber so willed it. In its opinion the court said, page 893:

> "* * * The legislature cannot enact a lawful statute by invoking the police power on the pretense of protecting public interests when the actual objective of the statute constitutes an arbitrary interference with private business, or imposes unusual and unnecessary restrictions upon lawful occupations; if such statute does not tend to preserve the public health, safety or welfare, it is void as an invasion of individual property rights. *People* v. *Carolene Products Co.*, 345 Ill. 166, 177 N. E. 698.
>
> "Obstacles are interposed by the act to a person freely and of his own choice engaging in the occupation of master plumber, the trade of journeyman plumber, and the activity of learning the trade by apprenticeship. One cannot be a licensed master plumber unless he has prior thereto been a licensed journeyman plumber, and before that a certified registered plumber's apprentice. No matter how well qualified a person may be by instruction and training, he can never of his own free will and choice become a certified registered plumber's apprentice, a

journeyman plumber or master plumber, unless a licensed master plumber so wills. * * *

* * * * * * *

"A class cannot be created through the medium of an arbitrary statutory declaration by the legislature in order that it may be the recipient of special and exclusive legislative favors. To render the classification a valid one in such instances, it must rest on material distinctions in the situation and in the circumstances of individuals who are to be recipients of the favors. Those grounds of distinction and classification must be related in reason and principle to the privileges granted to individuals, as a class, by the legislature. *Marallis* v. *City of Chicago*, 349 Ill. 422, 182 N. E. 394, 83 A. L. R. 1222; *People ex rel. Akin* v. *Board of Supervisors*, 185 Ill. 288, 56 N. E. 1044. *The legislature, by the act under consideration, has interfered with the inherent right of citizens freely and of their own choice to engage in the legitimate vocation of learning the trade of journeyman plumber.* The inherent police power of the State was used to bring about that interference, and such interference must be related to the health, safety or general welfare of the public. * * *" (Emphasis added.)

To the same effect see *City of Sioux Falls* v. *Kadinger*, 74 S. D. 217, 50 N. W. 2d 797; *State* v. *Crawford*, 104 Kan. 141, 177 Pac. 360; *Smith* v. *State of Texas*, 233 U. S. 630; and *People* v. *Ringe*, 197 N. Y. 143, 90 N. E. 451.

There are many authorities holding that a state legislature cannot validly delegate even to official agencies of the state complete power to determine the qualifications of persons to engage in prescribed occupations without standards of any sort. *Harrigan & Reid Co.* v. *Burton*, 224 Mich. 564, 195 N. W. 60; *Dean Milk Co.* v. *City of Aurora*, 404 Ill. 331, 88 N. E. 2d 827; *City of St. Louis* v. *Polar Wave Ice & Fuel Co.*, 317 Mo. 907, 296 S. W. 993. If such unbridled discretion cannot be conferred upon ad-

ministrative agencies of a state, it most certainly cannot be conferred upon private individuals such as optometrists and ophthalmologists.

If Oklahoma desires to provide special qualifications for persons engaged in the vocation of opticianry, it has the power to adopt acts licensing and qualifying opticians. Accordingly, it is submitted that Section 2 of House Bill No. 953 is unconstitutional in that it deprives plaintiffs and persons similarly situated of the right to engage in a lawful business and in effect delegates the control of that business to private individuals who may exercise the authority delegated arbitrarily and capriciously in violation of the XIV Amendment.

C. Section 2 of House Bill No. 953 is unconstitutional under the XIV Amendment because it unreasonably, arbitrarily and capriciously discriminates against plaintiffs and persons similarly situated by exempting from its requirements the sale of ready-to-wear glasses equipped with convexspherica lenses.

Despite the numerous restrictions placed by Section 2 upon the sale of lenses, frames and eyeglasses by dispensing opticians, Section 3 of House Bill No. 953 provides:

> "* * * Nothing in this act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses * * * when sold as merchandise at any established place of business and where the selection of the glasses is at the discretion of the purchaser."

Convexspherical lenses represent one type of lens customarily sold by opticians. There is no difference between the effect of identical convexspherical lenses whether prescribed or purchased ready to wear. Furthermore, there is no difference in their effect upon the wearer's eyes from that of other than convexspherical lenses. In short, either type can cause any permanent damage to the eye,

even though the lens may not be the proper one to correct the refractive error in the wearer's eyes. Consequently, there is in fact no real difference in classification, so far as the public health and welfare is concerned, between eyeglasses containing all types of lenses and ready-made eyeglasses containing only convexspherical lenses.

The law is well settled that while the equal protection clause of the Fourteenth Amendment does not prevent a state legislature from resorting to classification in a police power measure, yet the classification, to come within the sanction of the clause, must be reasonable and not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated are treated alike. *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, *Old Dearborn D. Co.* v. *Seagram Distil. Corp.*, 299 U. S. 183. Since there is in fact no difference between eyeglasses containing convexspherical lenses and other glasses so far as the public health and welfare are concerned the exemption of convexspherical lenses from the provisions of Section 2 is an unreasonable, arbitrary and capricious discrimination against plaintiffs and other opticians.

A somewhat analogous purported classification was under consideration in *People* v. *Weiner*, 271 Ill. 74, 110 N. E. 870. In that case the court considered an Illinois statute which forbade the use of certain second-hand material in the making of mattresses. However, the same prohibition did not apply to pillows. In holding that the statute was unconstitutional because of the arbitrary and unreasonable classification, the court said, pp. 873-874:

> "Counsel for plaintiff in error further argue that there is a discrimination between the manufacturers and dealers in pillows and manufacturers and dealers in mattresses, comforters and quilts, especially after

they have been used, as there is no provision made as to pillows; that, so far as this act is concerned, material made secondhand in the same way as the material in mattresses may again be made into pillows and sold without any regulation whatever. Under the decisions of this state this is class legislation. *People* v. *Schenck, supra; Josma* v. *Western Steel Car Co.*, 249 Ill. 508, 94 N. E. 945; *Manowsky* v. *Stephan*, 233 Ill. 409, 84 N. E. 365; *Horwich* v. *Walker-Gordon Laboratory Co.*, 205 Ill. 497, 68 N. E. 938, 98 Am. St. Rep. 254; *Lippman* v. *People*, 175 Ill. 101, 51 N. E. 872; 1 Lewis' Sutherland on Stat. Const. (2d ed.), §203. The provisions of sections 1 and 2 of the act are arbitrary and unreasonable, and must be held unconstitutional and void."

And in *City of Chicago* v. *Netcher*, 183 Ill. 104, 55 N. E. 707, the court held unconstitutional an ordinance that provided:

"• • • 'It shall be unlawful for any person, firm or corporation doing business in this city, where dry goods, clothing, jewelry, and drugs are sold, to have exposed for sale, or sell to any person, firm, or corporation, any meats, fish, butter, cheese, lard, vegetables or any other provisions.' • • •"

In the lower court it had been agreed that the defendant owned and operated a store in which he sold dry goods, clothing, jewelry and drugs, and also in the same store, but on a different floor, sold meats, fish, butter, cheese, lard, vegetables and other provisions. In its opinion the court said, pp. 708-709:

"• • • But this ordinance does not regulate the business of selling provisions, nor prescribe the manner in which the business shall be carried on. It merely prohibits persons engaged in the business of selling dry goods, clothing, jewelry, and drugs from selling in their stores the provisions enumerated in

the ordinance. It permits a person to sell in any place or manner, provided, only, that he does not at the same time sell certain other things. A dealer may sell provisions at the same place with hardware, furniture, boots and shoes, hats and caps, millinery, books and stationery, crockery and glassware, carpets, confectionery, wooden ware, wallpaper, or any other sort of merchandise except dry goods, clothing, jewelry, and drugs. This is not a regulation, but a prohibition, and a purely arbitrary one, which attempts to deprive certain persons of exercising a right which has always been lawful, and has been heretofore exercised throughout the state and country without question. The ordinance is also an attempted interference by the city with rights guaranteed to the defendant by the constitutions of the United States and of the state. * * *

* * * * * * *

"* * * It is plain that its object is not to protect the health, morals, or safety of the public, or to accomplish any object falling within the police power. It is a mere attempt to deny a property right to a particular class in the community, where all other members of the community are left to enjoy it. * * *"

Since there is no real difference in their impact upon the eyeglass-wearing public between ready-made eyeglasses containing convexspherical lenses and all other types of eyeglasses, the classification in House Bill No. 953 of ready-to-wear eyeglasses with convexspherical lenses and prescription eyeglasses into different groups so far as fitting, adjusting and duplication are concerned, and the imposition of restrictions as to those functions upon only prescription eyeglasses is clearly an arbitrary, unreasonable and capricious classification that contravenes the "equal protection" clause of the XIV Amendment.

II.

In depriving plaintiffs of the right to advertise their merchandise and services, Section 3 of House Bill No. 953 violates the XIV Amendment and also imposes unreasonable restrictions upon Interstate Commerce in violation of Article I, Section 8 of the United States Constitution.

A. The denial to opticians of the right to advertise their merchandise and services violates the XIV Amendment.

The evidence below established that plaintiffs and other opticians are engaged in an occupation of a dual nature. On the one hand they act as skilled craftsmen, while on the other they act as vendors of standard items of merchandise, such as frames, lenses and other optical supplies (R. 98, 116-117, 133, 145, 278). In fulfilling their merchandising functions opticians customarily advertise their calling, their merchandise and services (R. 167, 211-212, 216). Doctors Coston, Cordes, Braley and Lemoine all testified that in their opinion, proper advertising by opticians was neither objectionable nor detrimental to the public health and welfare (R. 109, 305, 365, 377).

Section 3 of House Bill No. 953 completely prohibits all advertising by all persons not only of complete eyeglasses, but also of frames, lenses and all other optical appliances[27]. While not mentioned specifically, the language of the prohibition would seem to include such optical instruments as telescopes, binoculars, transits, sextants, eyeglass adornments and other similar optical devices. The statute prohibits the solicitation of the sale of any such merchandise by any advertising media, specifically including window displays and telephone directory

[27]Defendants took the position below that the advertising prohibitions of Section 3 do not apply to the sale of ready-to-wear eyeglasses (R. 193-194). Another exception is "ethical education publicity or advertising" by a "legally qualified health group." Query: Are such organizations as The American Optometric Association and the Oklahoma Optometric Association "legally qualified health groups" that may advertise?

display advertisements. The section is unlimited in its application and applies to manufacturers such as American Optical Company, Bausch & Lomb and wholesalers, as well as opticians.

The court below found that Section 3 was unconstitutional in so far as it applied to frames, mountings or other optical appliances. However, it upheld the constitutionality of that section with respect to the advertising prohibitions against eyeglasses, lenses and prisms (R. 53-58). It is from that holding that plaintiffs have appealed in Number 185.

Plaintiffs do not challenge, and are not entitled to challenge, the constitutionality of Section 3 as applied to optometrists or ophthalmologists. In fact, by virtue of Section 7 of the Act, plaintiffs assume that Section 3 will remain in force as to professional practitioners even though the section be held unconstitutional as to dispensing opticians.

In their second proposition defendants cite various cases as authority for the complete statutory ban against all advertising by all persons contained in Section 3. Those cases simply do not so hold, for they are either cases concerned with the elimination of specific kinds of advertising of eyeglasses deemed abusive or cases regulating professional advertising by optometrists, dentists or lawyers. They do not hold and are not in any sense authority for the proposition that a state, through the exercise of its police power, may constitutionally completely prohibit *all types of advertising* of his business or wares by a craftsman or, for that matter, by wholesalers and manufacturers.

Also, on page 39 and again on page 48 of defendants' brief it is stated that 28 states have laws "prohibiting advertising in the field of visual care." This statement is

misleading for the reason that such laws are regulatory or prohibitive of certain advertising practices such as price, misleading or bait advertising, and frequently regulate only the practitioner of optometry rather than ophthalmic dispensers or other trades people[28]. With the possible exception of Section 1065 of the Louisiana Statutes relating to retailers and discussed in the *Rones* case, *infra*, we are not aware of any statute completely prohibiting all advertising of eyeglasses, frames, lenses and optical appliances of every kind or character whether or not bait, misleading or otherwise unwholesome, by any person or entity handling the same. It is submitted that there is no conceivable interest of the public so imperative and so general as to merit the condemnation of each and every form of advertising of optical appliances. To the contrary, it is to the best interests of the people of Oklahoma to be accurately informed respecting the quality and capabilities of optical products and to know who is offering such items for sale. There is no question but that some forms of advertising, such as false, misleading or inflammatory advertising designed to snare the unwary, are harmful. But truthful, dignified advertising harms only those who desire to conceal the truth.

A somewhat similar advertising measure was considered in *Jones* v. *Bontempo*, 137 Ohio St. 634, 32 N. E. 2d 17. There an Ohio statute that prohibited the advertising of prices of barber services in any form whatsoever was involved. The case arose when the State Board of Barber Examiners suspended plaintiff's license for having advertised "Haircutting 25-cents" in a window of his shop. An action was brought by the barber to set aside the board's order of suspension. In determining

[28]The same observation applies to the series of state statutes cited in the footnotes to pages 36, 43 and 44 of the American Optometric Association's brief.

that the statute was unconstitutional because the prohibition of advertising price had no sufficient relation to the public health and welfare, the court said, p. 18:

> "The trade of barbering, operating as it does directly on the person of the customer, affects the health, comfort and safety of the public and may be regulated within reasonable limits by the legislative branch of the government under that power known as the police power, 'conceded to reside in the people's representatives, which is rightfully exercised by the regulation of the use of private property, or so restraining personal action, as to secure or tend to the comfort, health, or protection of the community.' * * *
>
> * * * * * * * *
>
> "However, legislation of this character must bear some discernible relationship to the public health or welfare, and the General Assembly cannot under the guise of its police power impose unreasonable, captious or arbitrary rules, having no recognizable connection therewith.
>
> "How the mere advertising of the price of haircuts as done by the plaintiff could in any wise affect public health or welfare is difficult to understand.
>
> "If this legislation, absolutely prohibiting the advertising of prices of barber services, were to be upheld, it would likewise be necessary to uphold legislation prohibiting the vendors of groceries, meats or other commodities from advertising prices thereof in any manner, the unreasonableness of which is at once apparent."

Also, in *Regal Oil Co.* v. *State*, 123 N. J. L. 456, 10 A. 2d 495, the defendant was convicted of illegally displaying a sign relating to the price at which it sold gasoline in violation of a New Jersey statute providing that the price of gasoline must appear on each gas pump in the manner

regulated by the State Tax Commissioner and that no other sign relating to the price of gasoline was to be allowed. The defendant had used a large sign for the purpose of attracting passing motorists to his station. The State Tax Commissioner had issued regulations providing that each gas pump should have a sign stating the price per gallon of not less than 5½" x 8" and not more than 8" x 10". The defendant testified that he was an "independent" dealer and that he was forced to sell his gasoline at a slightly lower price in order to compete with the major companies in the industry. The court held that the statute had no substantial relation to the public health and general welfare and that it constituted an unreasonable restriction on the defendant's business, thus depriving it of property without due process of law in violation of the XIV Amendment of the Constitution of the United States. The court pointed out, at 10 A. 2d 497-498;

> "• • • The legal principles involved are rather well established. While it is true that a state may, in the exercise of its police power, pass legislation for the purpose of protecting and regulating public health, public safety, public morals, general welfare • • •, including public convenience or the general prosperity • • •, it is equally true that this power is not without limitations. The means adopted must be reasonably adapted to the accomplishment of that end, and must not be arbitrary or oppressive. • • • In other words, the legislation must bear a real and substantial relation to the public health, safety, morals or some other phase of general welfare. • • • Thus a regulation which in effect denies or unreasonably curtails the common right to engage in a lawful business cannot be sustained under the 14th Amendment. For as was said in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 278, 52 S. Ct. 371, 374, 76 L. Ed. 747, 754, "• • • nothing is more clearly settled than that it is beyond the power of a state, "under the guise of pro-

> tecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." * * *' "

And in *Levy* v. *City of Pontiac*, 331 Mich. 100, 49 N. W. 2d 80, an ordinance of the city of Pontiac that provided, "* * * No sign or placard stating the price or prices of gasoline other than such signs or placards as hereinabove provided [signs not larger than 12"x12" attached to pumps or dispensing devices] shall be posted or maintained on the premises on which said gasoline is sold or offered for sale." The Supreme Court of Michigan found that the ordinance bore no reasonable relation to public peace, health, morals, welfare or safety and held the ordinance unconstitutional, saying, p. 82:

> "It is within the police power to prohibit false, fraudulent or misleading advertising. *Jasnowski* v. *Judge of Recorder's Court*, 192 Mich. 139, 158 N. W. 229, and *People* v. *Austin*, 301 Mich. 456, 3 N. W. 2d 841.
>
> *"The right to advertise one's merchandise is, subject to the police power mentioned, within the right to liberty and property. The denial of such right is a taking of property without due process of law.* Ritholz v. *City of Detroit*, 308 Mich. 258, 13 N. W. 2d 283.
>
> "Business practices, such as the one against which the ordinance in question is directed, have no detrimental effect on public health, peace, morals, safety and welfare. The size of signs which plaintiff may care to use, and their location at points other than the pumps, if such signs are not misleading or fraudulent, may not be regulated by the legislative body of defendant city." (Emphasis added.)

Defendants' misconstruction and misplaced, unacknowledged emphasis by the italicization of quotations[29] from the decision in *State* v. *Rones*, 223 La. 839, 67 So. 2d 99, distort a decision upholding a statutory regulation of *price advertising* of eyeglasses into a decision validating a statutory prohibition of *all advertising*. The facts in the *Rones* case were these: The defendant, Rones, had run an ad in a daily newspaper in New Orleans which, among other things, advertised the price of eyeglasses and also that at his place of business there were "highly experienced opticians to carefully fit your glasses." L. S. A., R. S. 37:1063(9) provided that:

> "No person shall:
>
> * * * * * * *
>
> "(9) Advertise as free or for a price, any of the following: The examination, or treatment of the eyes; the furnishing of optometrical services; or the furnishing of a lens, lenses, glasses, or the frames or fittings thereof."

L. S. A., R. S. 37:1065, provided that:

> "The provisions of this Chapter shall not apply to * * * retail dealers selling glasses as merchandise in their established places of business. * * *
>
> "No retail dealer shall directly or indirectly, advertise through any medium the sale of glasses, or peddle, solicit, sell, or offer for sale glasses from door to door, or house to house, or away from his permanent established place of business."

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[29] The italicized portions of the quotations appearing on pages 45 and 46 of defendants' brief are defendants' and not the court's, except for the word "any" in the second paragraph. In the opinion that paragraph actually appears as follows:

> "The question presented by this case is whether a statute which prohibits *any* person, thereby including a retail dealer, from advertising the sale of glasses, lenses, etc., *for a price or without cost* is a reasonable regulation within the police power of the State and therefore constitutional." (67 So. (2) 105).

A criminal proceeding in two counts was filed against Rones, charging him with violation of L. S. A., R. S. 37:1063(9). The first count was that Rones had "* * * willfully and and unlawfully advertised as free or for a price the furnishing of optometrical services * * *," while the second was that he had "* * * willfully and unlawfully advertised for a price the furnishing of a lens and lenses and glasses and the frames and fittings thereof." Rones demurred to both counts, the first upon the ground that he was only advertising *optical* services, which was not within the prohibition of the statute regulating the profession of optometry (L. S. A., R. S., Title 37, Chapter 12, Sections 1041 *et seq.*), and hence, that his advertisement of "highly experienced opticians to carefully fit your glasses" was not the advertisement of optometrical services within the meaning of the statute. Rones' demurrer to the second count was based upon the contention that the first paragraph quoted above from Section 1065 exempted retail dealers from the provisions of Section 1063(9). With respect to the first count, the court said, p. 101:

> "The problem, then, is whether the advertisement of 'highly experienced opticians to *carefully fit* your glasses' was an advertisement of the furnishing of optometrical services within the meaning of the statute."

And with respect to the second count, p. 105:

> "The question presented by this case is whether a statute which prohibits *any* person, thereby including a retail dealer, from advertising the sale of glasses, lenses, etc., *for a price or without cost* is a reasonable regulation within the police power of the State and therefore constitutional."

With respect to Rones' contention that Section 1065 removed him from the operation of Section 1063(9), the court pointed out that while the first sentence exempted retail dealers selling glasses as merchandise in their established places of business, nevertheless, the second paragraph of the same section provided an exception to that exemption by prohibiting retail dealers from directly or indirectly advertising through any medium the sale of glasses. The court held that even though Rones as an optician was engaged in the sale of glasses at retail, he was not excepted from the prohibition of Section 1063(9) against advertising *for a price* the furnishing of lenses and glasses. The court then said, p. 103:

> "* * * In this connection we observe that the second paragraph of Section 1065, which makes it clear that retailers are not excepted from the advertising prohibition, is a broader prohibition than is Section 1063(9). The advertising prohibited by the last mentioned section is that 'free' or 'for a price,' whereas the advertising prohibited in the second paragraph of Section 1065 is unqualified as to kind or type for it says 'directly or indirectly advertise through any medium.' *In its broadest application, as we shall discuss later in this opinion, this second paragraph may present a serious constitutional question as to whether it is a valid exercise of the police power,* but in a limited application, which is all we are concerned with here, it serves to take retailers out of the general exemption in the first paragraph of Section 1065 insofar as that exemption could affect the scope of Section 1063(9), so that retailers are included in the word 'person' in that subsection and are prohibited from advertising in the manner denounced by it." (Emphasis added.)

Later in its opinion the court said, p. 105-6:

> "Under the provisions of the second paragraph of Section 1065 of the optometry statute, a retail dealer

> is prohibited from directly or indirectly advertising through any medium the sale of glasses, and under this provision an individual could be charged with advertising the sale of glasses even though the glasses were not offered in violation of Section 1063(9) as free or for a price. If the Legislature intended that under Section 1065 retailers of eyeglasses could be charged for advertising that would not be a violation of Section 1063(9), a more serious constitutional question would be presented, and, to the extent that the prohibition against advertising by retailers in Section 1065 is broader than that in Section 1063(9), a plea of unconstitutionality might have merit. However, we are not called upon here to decide this question for the reason that appellant in this case is being prosecuted under Section 1063(9), a reasonable regulation under the police power of the State."

The foregoing analysis makes it clear that the decision in the *Rones* case was only concerned with a statutory regulation of the advertisement of the *price* of eyeglasses and optometric services. The paragraph of Section 1065 which on its face would seem to prohibit all advertising was not only not involved in the case, but also, the court specifically questioned the constitutionality of such a prohibition had it been in issue. So far as plaintiffs are aware, the holding of unconstitutionality of a somewhat similar advertising prohibition as to dental laboratories in *Amsel* v. *Brooks,* 141 Conn. 288, 106 A. 2d 152, 158, appeal dismissed ..... U. S. ....., 99 L. Ed. (adv. p. 77), and the expression of doubt as to constitutionality in the *Rones* case are the only direct judicial statements bearing upon the issues raised by the complete prohibition of advertising contained in Section 3 of the Oklahoma Act.

Commonwealth v. *Ferris,* 305 Mass. 233, 25 N. E. 2d 378, did not, as asserted by defendants on page 51 of their brief, involve a statute "prohibiting advertising,"

but rather, as the *Rones* case, involved a statutory prohibition of *price* advertising. Similarly, *City of Springfield* v. *Hurst,* 144 O. St. 49, 56 N. E. 2d 185, cited on page 48 of defendants' brief, involved only a prohibition of *price and credit* advertising. It should be noted that statutes prohibiting price advertising of eyeglasses have been held unconstitutional in *Ritholz* v. *City of Detroit,* 308 Mich. 258, 13 N. W. 2d 283, and *State ex rel. Booth* v. *Beck Jewelry Enterprises, Inc.,* 200 Ind. 276, 41 N. E. 2d 622.

Klein v. *Department of Registration & Education,* 412 Ill. 75, 105 N. E. 2d 758, cited on page 53 of defendants' brief, was an action attacking the constitutionality of certain provisions of the Illinois Optometric Practice Act in their impact upon the plaintiff, Klein, a duly qualified registered and practicing optometrist. Klein expressly admitted, as do plaintiffs here, that the practice of optometry affects the public health and welfare and, hence, is a subject for proper regulation under the state's police power. So, in that case, the inquiry was whether the statutory regulations had a definite relation to the ends sought to be obtained. Here, there is no question concerning the power of the State of Oklahoma, through the exercise of the police power, properly to regulate advertising by those engaged in the practice of the statutory profession of optometry. Furthermore, the Illinois Act did not purport to prohibit all forms of advertising even by optometrists; it merely imposed certain regulations thereon. Accordingly, this decision, too, is not in point upon the problem presented by Section 3.

Similarly, *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608, involved only the regulation of advertising by persons practicing dentistry. Moreover, dentures and eyeglasses are not comparable items. The

former are deemed to constitute the rendition of a service because they are unique articles completely fabricated from raw materials for the exclusive treatment of one specific individual; the latter are merchandise. See *Commonwealth* v. *Miller*, 337 Pa. 246, 11 A. 2d 141, 142; *Rice* v. *Evatt*, 144 Ohio St. 483, 59 N. E. 2d 927, 928-929; *Klein* v. *Department of Registration and Education, supra*, p. 762.

Plaintiffs fail to detect the relevancy of *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P. 2d 427; *State Bar* v. *Retail Credit Association*, 170 Okla. 246, 37 P. 2d 954, or *In re Co-operative Law Company*, 198 N. Y. 479, 92 N. E. 15, cited pp. 42-44 of defendants' brief, to the constitutional issues involved in this case. The *Curtis* case was an action to enforce a licensing statute defining a practitioner of dentistry to include "any person" who "supplies artificial substitutes for natural teeth" against an unlicensed person purporting to operate a dental laboratory. The sole similarity to the present case lies in the irrelevant coincidence that the defendant was advertising, thus permitting the court to find that he was holding himself out to the public as being engaged in the practice of dentistry. Admittedly, as stated by defendants, this case is in harmony with the other wholly irrelevant case—the *Retail Credit Association* case—wherein the defendant, operating a collection agency, was held to be engaged in the practice of law. This whole line of authority is entirely foreign to any issue presently before this Court. All the evidence in this case establishes that opticians, in the performance of their functions, act as skilled craftsmen and merchants and not as professional practitioners. They do not hold themselves out as qualified to refract or treat eyes. In this connection, it should be observed that opinion of the medical experts who specifically testified

on advertising by opticians was that truthful, dignified advertising by opticians is not harmful to the public interest (R. 109, 305, 365, 377)[30].

B. Section 3 places an unreasonable burden and restraint on Interstate Commerce.

In addition to depriving plaintiffs of their property without due process of law, Section 3 of House Bill No. 953 also constitutes an unconstitutional interference with interstate commerce. As heretofore shown, this section does not regulate but completely prohibits all advertising of eyeglasses, lenses, frames and other optical goods in newspapers, magazines and over radio and television by dispensing opticians, wholesale opticians, manufacturers and suppliers of optical goods. It makes unlawful advertisments of eyeglasses in nationally circulated publications such as "Time," "Life," Collier's," "Saturday Evening Post" and a host of others, as well as the advertisements of eyeglasses, lenses and prisms, by American Optical Company, Bausch & Lomb, Shuron Optical Company, Univis Lens Company and Titmus Optical Company, that customarily appear in such publications as "The Optical Journal and Review of Optometry,"[31] "The Journal of the American Optical Association,"[32] "Guilderaft,"[33] and "The Optometric Weekly."[34] It would seem also that the illustrated sales catalogues circulated periodically by such

[30]In their brief (page 57) defendants advert to what is described as "The sinister advertising program of the respondents, done in violation of the laws of Oklahoma * * *." There is no evidence in the record which supports the accusation that plaintiffs or any other opticians in the State of Oklahoma are engaging in unduly extensive, inflammatory, misleading advertising or "sinister advertising programs."

[31]Published semi-monthly by the Chilton Co., Inc., Philadelphia 39, Pennsylvania.

[32]Official publication of the American Optical Association.

[33]Published by the Guild of Prescription Opticians of America, Inc.

[34]Published by the Professional Press, Chicago 2, Illinois.

companies as American Optical Company, Bausch & Lomb, Univis and Titmus to ophthalmologists, optometrists, opticians and others, in so far as they include advertisements of eyeglasses, lenses and prisms, violate Section 3. It even prohibits a public health campaign in this field of the type which has been conducted by American Optical Company in such magazines as the "Saturday Evening Post" (R. 356). All of these means of communication constitute interstate commerce, and such an absolute prohibition of advertising by such media places an undue and unreasonable burden and restraint upon such commerce.

That radio, newspapers circulated in more than one state, and television and other instrumentalities of interstate communication are protected by the Commerce Clause as interstate commerce cannot be questioned. See *Associated Press* v. *United States*, 326 U. S. 1, and *Lorain Journal Co.* v. *United States*, 342 U. S. 143. It also well established that local advertising by means of such media constitutes "* * * an inseparable part of the flow of interstate commerce * * *." See *Lorain Journal Co.* v. *United States*, *supra*, page 152. Section 3, by prohibiting advertising of eyeglasses, lenses, prisms and frames in Oklahoma by means of such media, not only burdens, but completely stifles this flow of commerce. The American Optometric Association in its *amicus curiae* brief (page 45, footnote 28) attempts to distinguish the *Lorain Journal* case by stating that there this Court did not pass on the question whether "the out-of-state distribution of some copies of the Journal, coupled with the considerable interstate commerce engaged in by its publisher in the purchase of its operating supplies, provided * * * a sufficient basis for classifying the publisher's entire operation as one in interstate commerce" and that such is the only possibility of interstate commerce here.

Quite to the contrary, as heretofore pointed out, the interstate commerce burdened by Section 3 includes the distribution within Oklahoma of national advertising originating throughout the nation and offering eyeglasses, lenses, etc., for sale on a national scale. Such advertising is similar to that found to be "an inseparable part of the flow of the interstate commerce * * *" in the *Lorain Journal* case (342 U. S. 151-152) and Section 3's absolute prohibition of such advertising is an unconstitutional restraint and burden on that commerce.

Moreover, it has been squarely held by a state court that a statute prohibiting the advertising of a particular article of merchandise constitutes an unconstitutional interference with interstate commerce when the prohibition is applied to advertising in a newspaper which circulates in several states. *State* v. *Salt Lake Tribune Pub. Co.*, 68 Utah 187, 249 Pac. 474, involved the constitutionality of a Utah statute prohibiting all advertising of cigarettes and any forms of tobacco products. A Salt Lake City newspaper, which had many subscribers in other states, was prosecuted under this act for publishing a Lucky Strike advertisement. The plaintiff argued that the prohibition against advertising was an undue burden upon interstate commerce. The court agreed and held the statute unconstitutional. It said that the advertiser was engaged in interstate commerce, that the newspaper was engaged in interstate commerce, and that, therefore, the prohibition against advertising was an undue burden upon interstate commerce. Thus, at page 476:

> "While the state of Utah could perhaps entirely prohibit the sale of cigarettes, in so far as the sales are not protected by the interstate commerce clause of the federal Constitution, yet, as already pointed out, Utah merely regulates the sale of cigarettes as it regulates the sale of many other articles of mer-

chandise. All sales of cigarettes which are made in compliance with the provisions of our statute are lawful. If it is lawful, therefore, to deal in and to sell cigarettes, why is it not lawful to inform those who may legally purchase an article where they may do so? It may be true that the state within its police power may, as a matter of regulation, seek to minimize the sale of an article the use of which it may deem injurious to the public health; and if it may do that, it may, perhaps, regulate or prohibit the advertisement of such an article. Where, however, as is the case here, the article in question is an article of commerce which is protected by the interstate commerce clause of the federal Constitution, it may well be doubted whether the state can interfere with the sale of an article which is so protected. The conclusion therefore seems irresistible that, in view that the advertisement published by the Salt Lake Tribune in and of itself constitutes interstate commerce with which the state of Utah could not interfere, and further that the article likewise was protected both by the laws of Utah permitting its sale and to the extent that the article was shipped into the state in original packages was also protected from interference by the state, the defendant was clearly within its legal rights in publishing the advertisement, and that the statute in question constitutes an undue interference with interstate commerce and therefore cannot be upheld."

The prohibition against advertising in this case applied to cigarettes and other forms of tobacco. The advertising and sale of such articles had long been opposed in Utah on the ground that the use and advertisement of such products offended public tastes. Such advertising was thought to be opposed to good public morals and dangerous for the youth of the state. Despite these reasons, none of which are applicable to the merchandise which the plaintiffs seek to advertise, the statutory prohibition against

advertising was held to be an undue burden upon interstate commerce. The court emphasized that the publication of the advertisement itself in a newspaper constituted interstate commerce which would necessarily be burdened, if the publication were prohibited. The same result was reached on similar facts in *Little* v. *Smith,* 124 Kans. 237, 257 Pac. 959.

It is submitted that the foregoing cases are bottomed upon the proposition that a state may not prohibit advertising by interstate communication of articles of merchandise the sale of which it cannot prohibit. This result should follow whether such inability to prohibit arises by virtue of the protection of the commerce clause or the limitations of the state's police powers. Since it is clear that a statute completely prohibiting the sale of eyeglasses, lenses, frames and other optical appliances would not constitute a valid exercise of the police power, the state may not constitutionally prohibit all advertising of such articles in interstate media without imposing an undue burden on interstate commerce.

C. Section 3 of House Bill No. 953 is unconstitutional as violative of the equal protection clause of the federal constitution.

Although House Bill No. 953 prohibits advertising of eyeglasses and frames and, under a literal interpretation, binoculars, opera glasses, telescopes and magnifying glasses, all of which are standard commercial articles, other standard commercial articles such as food, jewelry, clothing, hearing aids and trusses are not subject to a similar restriction. In fact, Title 59, Section 736.1[35] of the Oklahoma Statutes expressly exempts the advertising of hearing aids and trusses from the prohibition of price advertising set forth in that statute. It is apparent that the

[35]The statute is set forth in the appendix to this brief, page vi.

result is an unreasonable classification and is a hostile discrimination against dispensing opticians, optical manufacturers and other optical suppliers.

Also exempt, as heretofore pointed out, p. 59, is the solicitation for sale by advertising of ready-to-wear eyeglasses. Thus, under defendants' interpretation of Section 3, ready-to-wear eyeglasses equipped with convexspherical lenses, industrial glasses, goggles and sunglasses equipped with plano lenses, may be advertised by any of the media listed in the statute, but eyeglasses containing other types of lenses may not be advertised. It is obvious that the exemptions of ready-to-wear eyeglasses and other prosthetic devices such as hearing aids and trusses, is an arbitrary, discriminatory and unreasonable classification.

In *Truax* v. *Corrigan,* 257 U. S. 312, Mr. Chief Justice Taft, in speaking for the Court with reference to the equal protection clause of the XIV Amendment, said, pages 332-333:

> "The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. * * *"

Since the prohibition against advertising in House Bill No. 953 is a hostile discrimination against dispensing opticians, optical manufacturers and other optical suppliers, Section 3 of House Bill No. 953 violates the equal protection clause of the XIV Amendment.

III.

The court below did not err in holding unconstitutional that part of Section 4 which prohibits a firm engaged in the business of retailing merchandise to the general public from leasing space to a person for the purpose of conducting eye examinations.

A. Such portion of Section 4 is unconstituional because it arbitrarly and unreasonably interferes with the enjoyment and use of private property.

Plaintiff Rips attacked below only that portion of Section 4 that prohibits an optometrist or ophthalmologist from locating his professional office in a retail merchandising establishment. No challenge was or is made of the constitutional authority of a state to prohibit the practice of optometry or ophthalmology as an employee of a lay person, firm or corporation, or the prohibitions against rebates and the solicitation of business. Defendants contend, however, that the power to prohibit those things includes the power to prohibit perfectly legal relationships, such as leases, because they might be designed to circumvent the prohibition against corporate practice. The defense of this proposition is squarely bottomed by defendants on the absolute necessity "to eliminate the loophole whereby commercial control will inevitably be exercised over professional activities through the medium of attractive space or a department in a retail merchandising establishment." (Defendants' brief, p. 59.)

This defense is based upon two constitutional fallacies. The first is that the state is constitutionally permitted to terminate legitimate activities in order to correct evasive activities. This amounts to a constitutional doctrine punishing the righteous in order to include the wrongdoer. If such a doctrine ever found a place in American jurisprudence, it could be justified only in some extreme condi-

tion not found anywhere in the present problem. To detect the use of lease or other legal instruments as a device to avoid a prohibition against lay employment of professional people and to label such practices as violations of the public law has never been a difficult problem for the American judiciary. In fact, *Sears, Roebuck & Co.* v. *State Board of Optometry,* 213 Miss. 710, 57 So. 2d 726, cited and quoted at length by defendants [36] on pages 63 through 67 of their brief, and the numerous cases cited in that decision as well as the cases appearing in the annotations in 102 A. L. R. 343 and 128 A. L. R. 575, clearly demonstrate the ease with which courts have met the situations, arguments and assertions that defendants allege to be so difficult to control.

On the other hand, in *Rowe* v. *Burt's, Inc.* (Ct. of App., Ohio), 31 N. E. 2d 725; *State ex rel. Bricker* v. *Buhl Optical Co.,* 131 Ohio St. 217, 2 N. E. 2d 601, and similar cases, the courts have been able to recognize the absence of lay control of professional practice or lay disturbance of professional relationships involved in a bona fide lease of office space by a retail establishment and to permit honest business arrangements of this nature to stand. Certainly, the courts of Oklahoma are confronted daily with more difficult factual problems in more vital circumstances. It is submitted that restrictions upon the rights of optometrists and ophthalmologists to locate their offices where they will, cannot be constitutionally predicated solely on relieving the judicial and administrative officers of Oklahoma of the necessity of bearing a burden of proof which has been easily and frequently carried by comparable officers of sister states.

The second fallacy involved in the defendants' position is that the means determined upon by the State of Okla-

[36] And also by the Attorney General of Mississippi in his *amicus curiae* brief, pp. 12-30.

homa have any reasonable relation to the end sought. As pointed out in *Sears, Roebuck & Co. et al.* v. *State Board of Optometry, supra,* p. 732, the factual bases supporting a prohibition against the employment of professional optometrists by lay persons lies in the following theory:

> "'* * * The fact that the optometrist is the employee of an optical concern whose main interest is the sale of optical goods tends to be a distracting influence which may adversely affect his loyalty to the interests of his patient.'"

The basic aim of the state in statutes prohibiting the employment of optometrists or physicians by lay persons is the elimination of the chance of domination of the professional decisions of the practitioner by commercial interests. Obviously, such a chance arises only where the retail establishment sells eyeglasses. Yet, the present statute prohibits leasing of space in a dry goods store or a bicycle shop, for example. Even if it be assumed that the legislative policy was directed solely at relationships in which at some stage by some person eyeglasses are sold, it is still necessary to examine whether an optometrist renting office space from a retail establishment is any more likely to be dominated by commercial interests than an optometrist practicing in his own offices. Remembering that the state has appropriate means to prosecute an optometrist who is, in fact, operating as an employee of a commercial establishment, it seems clear that a professional man officing in a retail establishment selling eyeglasses, with no financial interest in prescribing eyeglasses, except the fee which he receives for his examination, has much less inducement to prescribe eyeglasses than the optometrist practicing in his own office who invariably sells the eyeglasses he prescribes. So long as the sale of eyeglasses is allowed by the State of Oklahoma to remain

a major economic part of the practice of optometry, the state may not legislate against a purely theoretical commercial influence supposed to affect the method of practice of one optometrist while leaving untouched direct, personal commercial interests actually dominating the permitted methods of practice of other optometrists. Until the State of Oklahoma is prepared to prohibit profit from the sale of eyeglasses from exercising its undeniable effect upon the decisions of professional optometrists by prohibiting their dealing in such merchandise, the effect of provisions such as Section 4 is not to eliminate or minimize commercial influence in the prescription of eyeglasses, but simply to legislate against a weak commercial interest in favor of a stronger and to encourage and enhance the monopoly of optometry in the sale of eyeglasses.

It would appear that the actual objective of this legislation is the elimination of the competition in the dispensing of eyeglasses experienced by optometrists from the dispensing departments of retail establishments. There is no evidence in this record which remotely tends to prove either that the eyeglasses so dispensed are of lesser quality than those dispensed by opticians or optometrists located in other retail space or that the examination and professional advice afforded is one iota less competent. In fact, Dr. Lemoine in testifying that in his opinion there was no relationship between the competency of an optometrist (or ophthalmologist) and the occupation of his landlord said:

> "It is my feeling that a person can work under any conditions anywhere and still be, you might use the term intellectual honesty—the working conditions have nothing to do with it. If you look at it in that aspect, competency is an individual quality in a person, as far as I am concerned, and if they have character they can work anywhere, middle of the street

or any place, and they can still retain their ability to work perfectly all right. So I would say in a general manner that way it should make no difference, because I still think that the whole thing is a personal function, and whether I like the idea or not is a different thing, but I see no reason why a person couldn't be completely competent working in a retail store or anywhere else, as far as his compentency is concerned. * * *

"I think it applies to anybody in any function of life. If they are ethical and have high standards, they can be competent any place, and if they aren't that way it won't make any difference where you put them, they are not going to be" (R. 378-379).

It is argued that a professional man who practices in a retail establishment may be affected by the profit motives of his lessor. It should be remembered, however, that the optometrist, who practices in his own downstairs store or office, sells his own prescribed glasses and thus himself realizes the profit involved. If the profit motive be the guide of legislation, then obviously the practitioner, such as Plaintiff Rips, practicing in leased retail space and collecting only an examination fee, has much less to gain by prescribing eyeglasses, than the optometrist who prescribes and makes the sale himself. A profit to others is much less seductive than a profit to oneself. As mentioned before, contrary to all other fields of strictly professional endeavor, the professional optometrist is today a man whose major source of income derives from the appliances he prescribes. The legislature cannot deal with this profession in a vacuum. It cannot lawfully deny to one practitioner the right to practice where he will, simply because of theoretical suspicions that a third party's profit motives may enter into the discharge of his professional duties, when, in fact, a more compelling personal profit in-

centive is apparent if he practices where and in the manner the legislature prescribes. So long as in this particular field of professional endeavor, the dispensing of merchandise is a vital part of the professional act, then all prior legal principles designed to protect and purify the learned professions from the inroads of mercantile influence must be set apart, for they have no application to a field of professional activity in which the sale of merchandise by the practitioner himself is a predominant and lawful part.

The utter inconsistency of defendants' and the American Optometric Associations' argument with respect to Section 4 is illustrated pointedly by the following. Defendants and the American Optometric Association state that the purpose of House Bill No. 953 is to assure the people of Oklahoma of the best possible visual care and that only licensed physicians and optometrists be permitted to make eye examinations (§ 941, 59 Okla. St. Ann.; Defendants' brief, p. 18; Brief, American Optometric Association, *amicus curiae,* p. 10). With these objectives plaintiffs agree. But when it comes to attempting to justify the reasonableness of Section 4's prohibition against the rental of space in a retail establishment to an ophthalmologist or optometrist, the American Optometric Association makes the following argument (*amicus curiae* brief, pp. 52-54): "[A state] can require that optometry and medicine not be practiced from door-to-door or outside of an office or fixed place of business. * * * That being so, it certainly can require that optometry and ophthalmology not be practiced in the middle of a department store. The public is attracted into a department store or other retail merchandise establishment for a variety of reasons. An attractive advertisement, a special bargain sale, the need for an article of clothing, or the mere desire to go shop-

ping may attract an individual into a store. But no one of these reasons should be the occasion for a professional eye examination. It cannot be doubted that the presence of an optometrical or ophthalmological department in a retail establishment would tend to induce many people who had entered the store for wholly different and unrelated purposes to have their eyes examined there."

The argument proves that the rental of space in a retail store would result in professional eye examinations that would not otherwise occur. The American Optometric Association attempts to avoid this obvious inconsistency in its argument by saying that the resultant "good" is "not the point"—that the "evils" are professional services resulting from advertisements or "obtained as a mere incident to a downtown shopping trip to a department store." Moreover, that the "evil does not lie in the fact that an examination was had, but in the fact that the particular optometrist or physician was consulted, not because of any particular professional skill, but because he happened to be located in the middle of a retail commercial establishment." The answer to all of the above is that neither the ophthalmologist nor optometrist in Oklahoma can advertise, so the examination cannot result from such advertising. Secondly, whether or not the examination is incidental to a trip to a department store is immaterial. The same is frequently true where the ophthalmologist has his office on the twentieth story of an office building. Lastly, the competence of the practitioner in the retail establishment is in no way determined by his location or by anything in House Bill No. 953. In this latter connection, the testimony of Dr. Cordes (R. 300-301) and Dr. Lemoine (R. 397-400) is revealing.

The law is clear that unjustifiable restrictions upon the use of real property cannot be sustained under the police

power. Thus, in the case of *Curran Bill Posting and Distributing Co.* v. *City of Denver*, 47 Colo. 221, 107 Pac. 261, the court said, page 263:

> "* * * The natural right one may have to use his own property as he wills is subject always to the limitation that in its use others shall not be injured. That which is hurtful to the comfort, safety, and welfare of society may always be prohibited under the inherent or plenary power of the state, notwithstanding the incidental inconvenience or loss individuals may suffer thereby. * * * It is equally true, however, that the owner of property has the right to put it to any use he desires, provided in so doing he does not imperil or threaten harm to others. Legislative restrictions of the use of property are imposed only upon the theory of necessity; that is, they are necessary for the safety, health, comfort, or general welfare of the public."

Nor can the restrictions imposed by Section 4 of House Bill No. 953 be upheld as analogous to zoning restrictions. Zoning regulations "* * * find their justification in some aspect of the police power, asserted for the public welfare * * *," but circumstances justifying the restriction must be shown, *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387. For example, in *Pacific Palisades Ass'n* v. *City of Huntington Beach*, 196 Cal. 211, 237 Pac. 538, plaintiff brought an action to enjoin the City of Huntington Beach from attempting to enforce the provisions of an ordinance that prohibited persons from erecting derricks, installing machinery and drilling oil wells on lands within the city limits. Plaintiff owned thirteen acres of land within the city limits. In reversing the trial court's order sustaining a demurrer to the complaint the Supreme Court of California said, page 539:

> "It is alleged that the respondent city arbitrarily and without reason adopted the ordinance prohibiting

the drilling of oil on appellant's land, and that its action is unreasonable, arbitrary, and discriminatory. In support of these general averments it is alleged that the property of appellant is proven oil land, and is situate upon the principal oil-bearing district of the city of Huntington Beach. Within 500 feet of appellant's easterly line there are now producing wells, and within 900 feet of its property there are no less than 20 completed wells. * * *

"* * * While the use to which one may put his property may be restricted or regulated by the state, in the exercise of its police power, so far as it may be necessary to protect others from injury from such use, *it is elementary that the enjoyment of the property cannot be interfered with or limited arbitrarily. In re Kelso,* 147 Cal. 609, 611, 82 P. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178. It must be taken as very definitely settled in this state that the right to zone may be resorted to by municipalities upon a proper invocation of the police power. *Miller* v. *Board of Public Works* (Cal. Sup.), 234 P. 381; *Zahn* v. *Board of Public Works* (Cal.), 234 P. 388. But such zoning must be reasonably necessary and reasonably related to the health, safety, morals or general welfare of the community. * * *" (Emphasis added.)

Judged by these tests, it is clear that Section 4 is invalid in prohibiting the use of private property. The use that Plaintiff Rips desires to make of his leasehold interest is not dangerous to the public, the rights of others are not affected, and it is no more aesthetically displeasing than any other land use in a city's business district. It might also be pointed out that, although plaintiff's use is forbidden, Section 4 does not prohibit an optometrist from leasing prime retail space immediately adjacent to a retail store. This fact demonstrates that the restriction upon the use of property imposed by Section 4 is unnecessary, capricious and arbitrary.

B. Section 4 impairs the obligation of contracts and is, therefore, unconstitutional.

The value of Dr. Rips' lease was shown to be $25,000. Yet, Section 4 strikes down this lease and thus impairs the obligations of a private contract in violation of Article I, Section 10, of the Constitution of the United States upon the asserted ground that such a lease might conceivably permit corporate practice. The obligations of private contracts cannot validly be impaired by an exercise of the police power which is not genuinely for a bona fide public purpose or in which the means are not reasonably related to the end sought. Obviously, the degree of merit of an eye examiner or one giving visual care has no connection with the occupation of such examiner's landlord.

In a case in which this Court declared an alleged police measure to be an unconstitutional impairment of private contracts on the ground that only private rights, and not public interests, were being affected, this Court said, "* * * Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive." *Treigle* v. *Acme Homestead Asso.*, 297 U. S. 189, 197. And, in *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 108-109, it was said, pages 108-109:

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end * * *."

Most certainly no public end is being served by Section 4's arbitrary prohibition against the rental of space in retail stores to persons performing eye examinations. Doctors Cordes and Lemoine both stated that in their opinion the physical location and surroundings of a practitioner's office had no relationship to the quality or standards of his practice (R. 300-301, 378-379). Similarly, even if it be assumed that the prevention of corporate practice is the end sought, the rental prohibition of Section 4 is not a means reasonably adapted to that end, in view of §§510, 585 and 588, 59 Okla. St. Ann.

IV.

The court erred in excluding plaintiffs' offered Exhibit 2.

Plaintiffs' Exhibit 2 (R. 459-462, 220, 265) is a copy of a letter written by W. S. Farmer, an Oklahoma optometrist, on the official letterhead of the Oklahoma Optometric Association under date of March 13th, 1953. The letter was sent to all optometrists belonging to the Oklahoma Optometric Association. It advised them that the optometrists were "off to war" and that the "* * * spreading menace of the dispensing opticians has forced us to introduce * * *" into the Oklahoma legislature House Bill No. 953 and its Senate companion bill, No. 924. The letter concludes by saying, "Two things we do not want. First, we do not want to have our present law amended. Second, we do not want the dispensing opticians licensed to practice." Defendants objected to Exhibit 2 upon the ground that it was incompetent, irrelevant and immaterial and for the further reason that it constituted hearsay evidence (R. 221). The court sustained the objection upon the ground that it was hearsay and immaterial (R. 221, 224, 265).

The hearsay objection was not pertinent because plaintiffs offered Exhibit 2 not for the truth of the statements

contained therein, but rather to show the background of the relations between optometry and opticianry and for the purpose of shedding light upon the conditions and facts existing at the time of and before the enactment of House Bill No. 953. It was offered under such precedents as *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543; *Hammond* v. *Schappi Bus Line*, 275 U. S. 164; *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402; *Miller* v. *Schoene*, 276 U. S. 272. In all of the foregoing cases it was held that a court, in passing upon the constitutionality of a statute enacted under the police power, should consider evidence of controlling economic conditions and the special facts existing at and before the enactment of the statute. *Cf. Burke* v. *Kansas State Osteopathic Association*, 111 F. 2d 250 (10th Cir., 1940); *Muller* v. *Oregon*, 208 U. S. 412. See also, "The Presumption of Constitutionality Reconsidered," 36 Col. L. Rev. 283, 285; "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," 38 Harv. L. Rev. 6, 15-16, and "The Presentation of Facts Underlying the Constitutionality of Statutes," 49 Harv. L. Rev. 631.

It is submitted that under the foregoing authorities Exhibit 2 was material and admissible for the purpose of showing the circumstances existing at the time of, and before, House Bill No. 953 was passed by the Oklahoma Legislature.

Conclusion.

For all of the foregoing reasons, it is respectfuily submitted that the decision of the court below holding portions of Sections 2, 3 and 4 of House Bill No. 953 (59 Okla. St. Ann., §§942-944) unconstitutional should be affirmed, except in so far as it upholds those portions of Section 3 prohibiting the advertising by others than optometrists and ophthalmologists of eyeglasses, lenses and prisms, in which respect it should be reversed.

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February, 1955

APPENDIX.

ENROLLED HOUSE BILL NO. 953.

By: Harkey (McCurtain), Ham, Sandlin, Welch (McCurtain), Vandiver, of the House,
and
Collins, Hope, Cooper, Cowden, Price and Field, of the Senate.

An act relating to visual care: defining terms; prohibiting dishonest and dangerous practices in the sale of optical goods and devices; prohibiting discrimination; making the act cumulative to other laws; making violation a misdemeanor authorizing injunction against violators.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another.

SECTION 2. It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951, to fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or at-

tempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes, 1951, may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this section shall not prevent a qualified person from making repairs to eye glasses.

SECTION 3. It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms or other optical appliances for visual correction. Provided, however, that the provisions of this Act shall not render any newspaper or other advertising

media liable for publishing any advertising furnished them by a vendor of said commodity or material; nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

Section 4. It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction to receive or accept any rebate, kick-back, reward or premium from any optical company or any other person, firm or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes. It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization, group or lay person and it shall be likewise unlawful for any corporation, lay body, organization, group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of a person licensed under the provisions of Chapters 11 or 13

of Title 59, Oklahoma Statutes, 1951, provided that this sentence shall not apply to the University of Oklahoma School of Medicine and Hospitals, or to a bona fide resident physician of a licensed hospital. No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store. Nothing in this Section shall prohibit a person licensed under Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes, from organizing or maintaining a professional association with other persons so licensed.

SECTION 5. No department, commission, board, official, employee, or agency of the State of Oklahoma, or of any county, municipality or other subdivision of the State of Oklahoma shall, in the performance of its duties and functions in obtaining examination for refractions and visual training or correction for citizens of this state discriminate between persons licensed to perform examination for refraction and visual training or correction within the field for which their respective license entitle them to practice; and no such department, commission, board, official or agency of the state, county, municipality, or other subdivision shall send any resident of the State of Oklahoma out of this state to receive or be furnished such services. This Section shall have no application with respect to any person confined in the University Hospitals.

SECTION 6. Any person, firm, company, corporation, or partnership violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished for each such offense, as provided by law, and in addition thereto may be enjoined by a court of competent jurisdiction for any further violations of the provisions of this Act. It shall be the manda-

tory duty of the county attorneys of the respective counties to bring such injunction suits when a verified complaint is filed with such county attorney alleging any violations of this Act. This Act shall not supersede other laws, but shall be cumulative to other statutes of the State of Oklahoma.

SECTION 7. If any of the provisions of this Act shall be held by a court of competent jurisdiction to be inapplicable to a specific person or set of circumstances, the same shall not affect the validity of this Act in regard to other persons or circumstances.

SECTION 8. The provisions of Sections 1, 2 and 6 of this Act shall not extend, limit or affect the legal scope of practice of persons licensed under the provisions of Chapter 14, Title 59, Oklahoma Statutes, 1951.

§492. *Practice of medicine—Meaning of term.*—Every person shall be regarded as practicing medicine within the meaning and provisions of this Act, who shall append to his name the letters "M.D.," "Doctor," "Professor," "Specialist," "Physician," or any other title, letters or designation which represent that such person is a physician, or who shall for a fee or compensation treat disease, injury or deformity of persons by any drugs, surgery, manual or mechanical treatment whatsoever.

But nothing in this article shall be so construed as to prohibit the service in the case of emergency, or the domestic administration of family remedies; nor shall this Act apply to any commissioned medical officer in the United States Army, Navy, or Marine Hospital service in the discharge of his professional duties, nor to any legally qualified dentist, when engaged exclusively in the practice of dentistry, nor to any legally licensed optometrist when engaged in the practice of optometry as defined by law, or to any physician or surgeon from another state or

territory when in actual consultation with a legal practitioner of this state, if such physician or surgeon is at the time of said consultation a legal practitioner of medicine or surgery in the state or territory in which he resides, nor to any physician or surgeon residing on the border of the neighboring state, and duly authorized under the laws thereof to practice medicine and surgery therein, whose practice extends within the limits of this state; providing that such physician or surgeon shall not open an office or place to meet patients or receive calls within the limits of this state; provided, that this Act shall not be construed so as to interfere in any way with the practice of those who endeavor to prevent or cure disease or suffering by spiritual means or prayer. Laws 1923, ch. 59, p. 104, §12 (59 Okla. St., 1951 §492).

§581. *Practice of Optometry—Definition.*—The practice of Optometry is defined to be the science and art of examining the human eye and the correcting or relief of ocular abnormalities by the employment of any means, including the use or furnishing of any self-testing device, other than the use of drugs, for the measurement of the powers of vision and the adaptation of lenses or prisms for the aid thereof. Laws, 1927, ch. 80, p. 113, §1; Laws, 1937, p. 95, §1 (59 Okla. St., 1951, §581).

§736.1. *Service, commodity or material requiring examination or prescription prohibited—Hearing aids and trusses excepted.*—No person, firm, or corporation, or a member of any professional group regulated and defined by the Statutes of Oklahoma, shall advertise the price of any service, commodity, or material which requires a prior examination and/or prescription by and/or from a person licensed to practice a healing art in this state as defined by Title 59, Oklahoma Statutes, 1951, to determine the proper service, commodity, or material to be rendered or

delivered to the user or consumer thereof for the purpose of the correction or relief of any abnormalities or deformities of the human body. Provided this Act shall not prohibit the advertisement of hearing aids, and/or trusses. Laws, 1947, p. 359, §1 (59 Okla. St., 1951, §736.1).

No.

185

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 185

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS,

Appellants,

vs.

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA; ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATEMENT AS TO JURISDICTION

DUKE DUVALL,
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INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	3
The questions are substantial	7
Appendix "A"—Opinion of the United States District Court for the Western District of Oklahoma filed March 1st, 1954	10
Appendix "B"—Judgment and Decree of the United States District Court for the Western District of Oklahoma filed March 29th, 1954	39

Table of Cases Cited

Associated Press v. *United States*, 326 U.S. 1, 89 L. ed. 2013 — 8

City of Springfield v. *Hurst*, 144 Ohio St. 49, 56 N. E. 2d 185 — 8

Commonwealth v. *Ferris*, 305 Mass. 237, 25 N.E. 2d 378 — 8

Herkness v. *Irion*, 278 U.S. 92, 73 L. ed. 198 — 2

Interstate Busses Corporation v. *Blodgett*, 276 U.S. 245, 72 L. ed. 551 — 2

Jones v. *Bontempo*, 137 Ohio St. 634, 32 N. E. 2d 17 — 8

Levy v. *City of Pontiac*, 331 Mich. 100, 49 N. W. 2d 80 — 8

Lorain Journal Company v. *United States*, 342 U.S. 143, 96 L. ed. 162 — 8

Palmetto Fire Insurance Company v. *Connecticut*, 272 U.S. 295, 71 L. ed. 243 — 2

Regal Oil Company v. *State*, 123 N. J. L. 456, 10 A. 2d 495 — 8

Roschen v. *Ward*, 279 U.S. 337, 73 L. ed. 722, 29 F. 2d 762 — 8

State v. *Rones*, — La. —, 67 So. 2d 99 — 8

Statutes and Other Authorities Cited

Constitution of the United States:

Article I:

	Page
Section 8	2
Section 10	2
Fourteenth Amendment, Article 1	2

House Bill Number 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Oklahoma Statutes Annotated, Section 943):

Section 1	2
Section 2	2, 3
Section 3	2, 3
Section 4	2, 3

Oklahoma Statutes Annotated, Title 59, Section 943

United States Code, Title 28:

Section 1253	2
Section 2201	3
Section 2202	3
Section 2281	2, 3
Section 2282	2, 3
Section 2283	2, 3
Section 2284	2, 3

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6002—Civil

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, D. B. A. DOUGLAS OPTICAL; AND ORAN RIPS,
Plaintiffs,

v.

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA; ET AL.,
Defendants.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Lee Optical Company of Oklahoma, Inc., and Ellis Carp submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment and decree of the District Court entered in this cause on March 29th, 1954. A petition for appeal is presented to the District Court herewith, to-wit, on May 25, 1954.

Opinions Below

The opinion and partial dissenting opinion of the District Court of the United States for the Western District

of Oklahoma are unreported. Copies thereof and of the final judgment and decree are attached to this statement as Appendix "A".

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the judgment and decree entered in this cause is conferred by Section 1253 of the Judicial Code of the United States (28 U. S. C. § 1253). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment and decision of the District Court on direct appeal in this case: *Palmetto Fire Ins. Co.* v. *Conn.*, 272 U. S. 295, 71 L. Ed. 243; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 72 L. Ed. 551; *Herkness* v. *Irion* 278 U. S. 92, 73 L. Ed. 198.

Question Presented

This is a civil action in which plaintiffs filed their complaint against Mac Q. Williamson, Attorney General of the State of Oklahoma and the seventy-seven County Attorneys of that state requesting a declaration that Sections 2, 3 and 4 of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. § 943) violate Sections 8 and 10, Article I of the Constitution of the United States and the "due process" and "equal protection" clauses of Article I of the XIV Amendment to the Constitution of the United States and further praying injunctive relief against the enforcement by defendants of said statutes pursuant to the provisions of Sections 2281-2284 of the Judicial Code (28 U. S. C. §§ 2281-2284). The Three-Judge District Court unanimously held that Section 1 of House Bill No. 953 (59 Okl. St. Ann. § 943) was unconstitutional insofar as it made it unlawful for any person not a licensed optometrist or ophthalmologist "to fit, adjust, adapt or in any manner apply lenses, frames, prisms or

other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon the written prescription of an Oklahoma licensed ophthalmologist or optometrist. The District Court, Circuit Judge Murrah dissenting, also held that portions of Sections 3 and 4 of House Bill No. 953 were unconstitutional but limited its holding with respect to Section 3 to that part of the statute that made it unlawful for any person "* * * to solicit the sale of * * * frames, mountings * * * or other optical appliances * * *". This appeal presents the question of whether, under the evidence and the record, the District Court erred in failing to hold that Section 3 is also unconstitutional in its application to the solicitation of the sale of spectacles, eyeglasses, lenses and prisms by radio, window display, television, telephone directory display advertisement or any other means of advertisement.

Statute Involved

House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) is the statute involved. A copy thereof is attached hereto as Appendix "B".

Statement

This civil action for declaratory relief was instituted by a complaint filed by plaintiffs on September 2, 1953, under Sections 2201 and 2202 of the Judicial Code (28 U. S. C. §§ 2201, 2202). Injunctive relief against the enforcement of House Bill No. 953 by the defendants was requested pursuant to Sections 2281 to 2284, inclusive, of the Judicial Code (28 U. S. C. §§ 2281-2284).

Insofar as it is now pertinent, the complaint alleged that

the defendant Attorney General and the defendant County Attorneys are the persons charged with enforcement of the laws of the State of Oklahoma and the defendant County Attorneys the persons whose duty it was to prosecute plaintiffs for any violation of House Bill No. 953.

Plaintiffs Lee Optical of Oklahoma, Inc. and Ellis Carp are engaged within the State of Oklahoma in the business known to the trade as "dispensing opticians". Neither is a licensed physician nor optometrist in the State of Oklahoma and neither purports to practice as such. It was alleged that after the effective date of House Bill No. 953 (September 5, 1953), plaintiffs could no longer lawfully (a) advertise by radio, newspaper, television, window displays or by any other means of advertisement the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms or any other optical appliances or devices; (b) fit, adjust, adapt or in any manner apply lenses, frames, prisms or other optical appliances to the face of any person or duplicate or attempt to duplicate or place or replace into frames any lenses or other optical appliances which had been prescribed, fitted or adjusted for visual correction or which were intended to aid human vision except upon written prescriptive authority from an Oklahoma licensed ophthalmologist or optometrist.

There are three main groups in the field of visual care—the ophthalmologist, optometrist and the optician. The ophthalmologist is a medical doctor specializing in eye care. The optometrist is a quasi-professional who measures the refractive error of the human eye by means other than the use of drugs and also acts as a craftsman and merchant in filling prescriptions for and selling eyeglasses prescribed by him. The optician is engaged in compounding and filling prescriptions for eyeglasses, the repair, fitting, adjusting and adapting of eyeglasses to the faces of per-

sons, the duplicating of lenses and the sale of frames and other accessories.

The optician is the oldest of the three groups, dating from the Middle Ages and perhaps from the pre-Christian era. He has for centuries followed a separate, skilled vocation dealing in the fabrication and sale of eyeglasses and parts therefor. He is both a skilled craftsman or artisan and a vendor of merchandise. As such the optician (a) takes the prescription of an ophthalmologist and translates that prescription into the designated kind and power of lens and inserts those lenses into frames; (b) sells new eyeglass frames for existing serviceable lenses without a prescription; (c) without prescription fabricates and sells duplicate eyeglasses for glasses previously prescribed; (d) replaces lenses by duplicating existing lenses, and (e) otherwise repairs and adjusts eyeglasses. In performing all of these functions he fits, adjusts and adapts frames to the face and inserts lenses into frames.

The optometrist is a person trained in the measurement of refractive errors of the human eye. In addition to such measurement practically all optometrists, unlike most ophthalmologists, sell the eyeglasses prescribed by them. Between 60% and 70% of the eyeglasses sold in the State of Oklahoma and other states of the Union are sold by optometrists. Almost invariably optometrists in Oklahoma and elsewhere refuse to give their patients prescriptions for eyeglasses which may be filled by opticians of their own choosing, but rather insist that such patients obtain their eyeglasses from the prescribing optometrist and let him fit and adjust those eyeglasses to the face. As a direct consequence of this almost uniform practice of optometrists and their dominant position in the sale of eyeglasses, the business of the dispensing optician derives almost entirely from ophthalmologists' prescriptions and members

of the general public who desire either duplicate eyeglasses, new frames or repairs to existing eyeglasses.

The dispensing optician is the artisan to whom the general public looks for services with respect to eyeglasses. He is also a necessary element to the practice of ophthalmology and is to the ophthalmologist what the pharmacist is to the medical practitioner. Without the optician the ophthalmologist would be compelled to devote much of his time to performing the merchandising and craftsman functions of the optician, thereby neglecting many serious problems such as eye surgery and the treatment of pathological conditions with which he alone in the field may deal.

The effect of Sections 2 and 3 of House Bill No. 953 on all Oklahoma opticians is to prevent them from:

> (1) Fitting, adjusting and adapting or in any manner applying lenses, frames, prisms or other optical appliances to the faces of persons without prescriptions;
>
> (2) Making without prescription duplicate eyeglasses and duplicating lenses including broken lenses of eyeglasses that have previously been prescribed;
>
> (3) Advertising by any means whatsoever their calling, merchandise and services, and
>
> (4) Filling or duplicating prescriptions of out-of-state ophthalmologists or optometrists.

The fitting and adjusting of frames and completed eyeglasses to the face of a person and the duplication of lenses and eyeglasses do not require a higher order of education and training than that of a skilled craftsman. Opticians are better qualified to perform such work than the ophthalmologist and as well or better qualified to do so than the optometrist. Moreover, the human eye has a wide tolerance and whether a person wears eyeglasses which have been erroneously prescribed, the prescription erroneously filled, or erroneously fitted and adjusted, there will be no change

in the anatomical structure of the eye. And the discomfort, if any, arising therefrom would be no greater than that caused by an ill-fitted pair of shoes. Thus, there is no real rational basis for taking away from opticians a substantial portion of their lawful business and the right to advertise their services and merchandise. The public health and welfare are not subserved by the challenged legislation, the effect of which is to transfer to the optometrist a major part of the optician's business.

The Questions Are Substantial

The question presented by this appeal resolves into the proposition of whether a state may, by the enactment of a statute such as Section 3 of House Bill No. 953, completely prohibit all advertising by non-professional persons engaged in the sale of merchandise and services. The Court below found that the optician was both a craftsman and a merchant and that he had but two things to sell—lenses and frames. Admittedly, the services he renders and the merchandise he sells are related to eyeglasses and their component parts. The lenses, frames and other component parts of eyeglasses that the optician stocks and sells come in standard sizes and shapes like any other mass produced merchandise. So far as his services are concerned the record includes the testimony of preeminent ophthalmologists that opticians are well qualified to perform such acts and, moreover, that no permanent injury to the eye can result from eyeglasses that are not perfect correction for a person's refractive error. The medical testimony below was uniformly to the effect that truthful, "non-bait" advertising by opticians was neither objectionable nor detrimental to the public welfare. In the light of such facts how can the public health and welfare require a complete prohibition of all truthful advertising of either complete eye-

glasses or their component parts by opticians, manufacturers, wholesalers or any other person dealing therewith?

The right to truthfully advertise one's goods is within the right to liberty and property of every person engaged in the sale of lawful merchandise and the denial of such right is the taking of property without due process of law. *Regal Oil Co.* v. *State*, 123 N. J. L. 456, 10 A. 2d 495 (1939); *Levy* v. *City of Pontiac*, 331 Mich. 100, 49 N. W. 2d 80 (1951); *Jones* v. *Bontempo*, 137 Ohio St. 634, 32 N. E. 2d 17 (1941). It would also seem that Section 3 places an unreasonable burden and restraint on interstate commerce since clearly the dissemination of news and information by newspapers circulated in more than one state, by radio and television constitutes interstate commerce. *Associated Press* v. *United States*, 326 U. S. 1, 89 L. Ed. 2013 (1945) and *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 96 L. Ed. 162 (1951). And even though the advertising included in such media be local in character, it nevertheless is an inseparable part of the flow of interstate commerce. *Lorain Journal Co.* v. *United States*, *supra*.

The question presented in this appeal is different from that decided in such cases as *State* v. *Bones* — La. —, 67 So. 2d 99 (1953); *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 56 N. E. 2d 185 (1944) and *Commonwealth* v. *Ferris*, 305 Mass. 237, 25 N. E. 2d 378 (1940), for those cases involved statutes prohibiting price or credit advertising. The statutes there considered did not forbid all advertising.

Nor is the question presented controlled by the decision of this court in *Rosche* v. *Ward*, 279 U. S. 337, 73 L. Ed. 722 (1928) for the issue in that case was the power of a state to regulate over-the-counter sales of readymade glasses of the type specifically exempted by Section 3. It is clear from the opinion in that case, both in the lower court [29 F. 2d 762 (S.D.N.Y. 1922)] and in this Court, that the decision

there went no further than to hold that, where it is conceded by the parties that a regulation requiring examination and fitting of the eyes of purchasers of spectacles at the time of the sale of eyeglasses is a proper exercise of the police power, a state statute requiring that an optometrist be present at the place of sale is not invalid as to vendors of readymade eyeglasses for the reason that the statute does not also require him to make an examination.

Whether or not a state, under the guise of the exercise of its police power, may completely prohibit all advertising of wares by a merchant is a question of importance not only to opticians, but also to all persons engaged in the sale or advertising of merchandise. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6002-Civil

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DBA DOUGLAS OPTICAL; AND ORAN RIPS, *Plaintiffs*,

vs.

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA; ET AL., *Defendants*

Before MURRAH, Circuit Judge, and VAUGHT and WALLACE, District Judges

WALLACE, District Judge. (Chief Judge Vaught concurring.)

OPINION—Filed March 1st, 1954

The plaintiffs bring this action under the Federal Declaratory Judgment Act [1] and challenge the constitutionality of certain provisions found in the recent Oklahoma Enactment dealing with the regulation of "visual care".[2] The statute subject to attack is commonly referred to as Enrolled House Bill No. 953 and is entitled:

> "An Act relating to visual care: Defining terms; prohibiting dishonest and dangerous practices in the sale of optical goods and devices; prohibiting discrimination; making the Act cumulative to other laws; making violation a misdemeanor authorizing injunction against violators."

[1] 28 U.S.C.A. §§ 2201, 2202. In addition plaintiffs request an injunction against enforcement of this State statute; this necessitates the three judge court provided for in § 2281.

[2] 59 Okla. St. Ann. §§ 941-947 (1951).

Plaintiffs, Carp, an individual, and Lee Optical Company, an Oklahoma corporation, are "dispensing opticians";[3] the other plaintiff, Rips, is an ophthalmologist, duly licensed to practice in Oklahoma, who offices in Tulsa, Oklahoma, in space rented from the Zales Jewelry Company. Plaintiffs Carp and Lee Optical direct their constitutional criticisms

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[3] The dispensing optician is both a craftsman and a merchant. He maintains a complete stock of frames from which the customers may make selections; these frames vary in size, shape, color and adornment. In order to fit the frames (and completed eyeglasses) to the customer's face he must have some artisan skill related to the science of optics and must have some knowledge of optical terms. As observed by A. D. Hill, a member of the National Guild of Prescription Opticians, and a Master in Ophthalmic Optics, a dispensing optician, in response to a question on just what his duties included: "A. I receive ophthalmic prescriptions from the ophthalmologists, and in very rare instances optometrists; do the technical work which involves measuring the distance between the pupils, commonly known as P. D., aiding in the selection of a frame, and of course in many cases it is a matter of styling with women, and some men are a little bit particular about what type of frame they wear; so actually it's a combination of technical work plus merchandising." (Tr. 77)

In addition to the dispensing optician the field of visual care has three other definable divisions. (1) The ophthalmologist, a duly licensed medical doctor who specializes in the care of the eyes; (2) The optometrist, a quasi-professional who is trained to examine the eyes for refractive error, and at the same time recognize but not treat diseases of the eye, and who acts also as craftsman and merchant in filling prescriptions for eyeglasses; (3) The optician (or optical supplier) who is a skilled artisan qualified to actually grind lenses and perform other tasks which the dispensing optician may not be equipped to perform.

at parts of sections 2 and 3 of the instant Act;[4] plaintiff, Dr. Rips, questions a portion of section 4.[5]

It is recognized, without citation of authority, that all

[4] Section 2 states: "It shall be unlawful for any person, firm, corporation, company, or partnership * * * (not an Oklahoma licensed ophthalmologist or optometrist) to fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that * * * (an Oklahoma licensed ophthalmologist or optometrist) may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses."

Section 3 provides: "It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of inviting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction. Provided, however, that the provisions of this Act shall not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor of said commodity or material; nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser."

[5] Section 4 provides: "It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye

legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not by decision invalidate an enactment merely because in the court's opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. A court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory.[6]

examination or visual correction to receive or accept any rebate, kickback, reward or premium from any optical company or any other person, firm, or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in, or interested in the sale of such optical goods, appliances, or materials, to solicit business for any * * * (Oklahoma licensed ophthalmologist or optometrist). It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization, group or lay person and it shall be likewise unlawful for any corporation, lay body, organization group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of * * * (an Oklahoma licensed ophthalmologist or optometrist) provided that this sentence shall not apply to the University of Oklahoma School of Medicine and Hospitals, or to a bona fide resident physician of a licensed hospital. *No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store.* Nothing in this Section shall prohibit * * * (an Oklahoma licensed ophthalmologist or optometrist) from organizing or maintaining a professional association with other persons so licensed." (Constitutional objection raised to portion emphasized)

[6] As phrased in the Court's syllabus in Adwon v. Oklahoma Retail Grocers Ass'n., Inc. (1951) 204 Okla. 199, 228 P. 2d 376, 377: "The Legislature is itself the judge of the conditions which warrant legislative enactments, and they are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary, capricious, and unreasonable, and hence irreconcilable with the conception of due process of law."

As observed by Mr. Justice Burton in the recent case of Salsburg v.

The Attorney General, in urging the validity of the Act in question, emphasizes that the general purpose and intent of the Act, as evidenced by the title's broad scope, is to make certain that the people of Oklahoma receive the best possible visual care;[7] and, argues that to achieve such a goal it is imperative that the entire field of visual care (or responsibility therefor) be under the direct supervision and administration of professional practitioners (either physicians or optometrists) with all non-licensed artisans and commercial interests prohibited from activity except pursuant to professional written prescriptive authority.

Unquestionably, many aspects of the field of visual care are of sufficient public interest to warrant the operation of police power authority, and many regulatory measures directed toward protecting the public in regard to eye care have been judicially sanctioned.[8] However, the manner and extent to which the definable segments which compose the entire field of visual care can be controlled, like all other objects of legislative regulation, is limited by that line wherein to cross-over is to step into the area of arbitrariness, unreasonableness and lack of rationality between

State of Maryland (No. 38, October Term, 1953, p. 8, fn. 9); "[. . .]. It is . . . a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it 'has transcended its power.' Atchison, T. & S.F.R. Co. v. Matthews, 174 U.S. 96, 104. 'A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.' Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584. See also, Middleton v. Texas Power & Light Co., 249 U.S. 152, 157-158; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79."

[7] This distinguishes the instant case from Palmer v. Smith (1948) 229 N.C. 612, 51 S.E. 2d 8 and Kindy Opticians, Inc. v. Michigan State Board of Examiners (1939) 291 Mich. 152, 289 N.W. 112, inasmuch as the primary issue before those courts was whether certain artisan practices constituted a practice of optometry.

[8] See, for example, Roselen v. Ward, Attorney General of the State of New York (1929) 279 U.S. 337, [illegible] S. Ct. [illegible]; Commonwealth v. Kresge Company (1929) [illegible] Mass. [illegible], 166 N.E. 558; Ritholz v. Commonwealth (1954) [illegible] Va. [illegible], 35 S.E. 2d 216.

the proposed control and the actual welfare of the public. Significantly, the "field of visual care", in its broadest aspect, occupies a rather unique position. The services rendered therein include those exclusively professional, those quasi-professional, those artisan and those strictly mercantile in character; and, each of these services has evolved into separate and distinct class of private endeavor.[9]

Although, the artisan, the merchant, as well as the professional may be regulated in any field where the regulated efforts bear directly upon the public health and welfare,[10] none can be restricted where the particular acts regulated do not involve matters of public interest; and, where a general field of endeavor is specifically composed of definable activities, some of which pertain to public health and welfare and others of which do not, the non-related activities cannot be regulated merely because of proximity of position. Control must cease when we pass from matters touching public welfare into matters historically mercantile and not rationally related to the public good; and, even where the public welfare is involved, the effect of the

[9] The original of the ophthalmologist, the pure professional, is identical to that of other medical doctors, or physicians; however, he has specialized in eye care. The optometrist, the quasi-professional, evolved from an artisan-merchant beginning to the place where certain professional training and experience has qualified him to examine eyes for refraction and recognize although not treat diseases of the eye; in addition, he has retained the artisan-merchant characteristic and continues to fill prescriptions and market the completed spectacles. The optician (whether a dispensing optician or an optical supplier) continues as a skilled artisan and a merchant who sells both services and goods.

[10] The test is not whether the service is professional, artisan or merchant, but whether the services rendered and merchandise sold directly relate to the public health and welfare. However, historically, there has been considerable correlation between the education and experience required to qualify a person for specific tasks, and the importance such tasks carry with regard to the public good. Thus, the true or learned professions, almost without exception, have been subjected to statutory regulation for the public's protection; and, where certain crafts and businesses which have existed for a considerable length of time and operated entirely free from regulation are prohibited or severely restricted the public necessity for such legislative control must be definite and not merely fanciful.

statute must bear a reasonable relation to the purpose to be accomplished [11] and must not discriminate between two similarly circumstanced groups, regulating one group but exempting the other.[12]

Clearly, that phase of visual care which deals with the actual examination of the eyes (whether for pathology or refraction) [13] together with promotional advertising which brings direct mercantile pressure upon the public to submit to examinations and to purchase spectacles, is subject to legislative control.[14] Although the evidence in the instant case indicates that no permanent injury to the eye can result from eyeglasses which concededly are misfitted,[15] the importance of accurate sight and seeing comfort (that is, a freedom from nervousness and other minor irritations which can result from ill-fitted spectacles) brings this segment of visual care squarely within the sphere of police power authority. Unquestionably, the general health and welfare could suffer as a result of promiscuous and indiscriminate fittings of eyeglasses by persons unqualified

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[11] Liggett Company v. Baldridge (1928) 278 U.S. 105, 111, 49 S. Ct. 57; Lawton v. Steele (1893) 153 U.S. 133, 137, 14 S. Ct. 499.

[12] Royster Guena Company v. Virginia (1920) 253 U.S. 412, — S. Ct. —; Coalgate v. Harvey (1935) 296 U.S. 404, 422, 423, — S. Ct. —; Old Dearborn Company v. Seagram Corporation (1936) 299 U.S. 183, 197, — S.Ct. —. Also, see People v. Weiner (1915) 271 Ill. 74, 110 N.E. 870.

[13] "* * * In furtherance of its general purpose and to carry out the details of its plan of regulation, the Legislature could properly vest the board (of examiners) with power to make regulations reasonably adapted to assure the competency of optometrists and to prevent conduct on their part which would tend to do harm to the public. (citing cases)". Sage-Allen Co. v. Wheeler (1935) — Conn. —, 179 Atl. 195, 200.

[14] State of Louisiana v. Ronas (1952) — La. —, 67 So. 2d 99; Ritholz v. Commonwealth (1945) — Va. —, 35 S.E. 2d 210; Commonwealth v. Ferris (1940) — Mass. —, 25 N.E. 2d 378.

[15] As mentioned by Dr. Tullos O. Coston, eminent ophthalmologist: "Q. In that connection, Doctor, if a person has a refractive error in his eye, and doesn't obtain glasses, is his eye going to be damaged or injured in any way? A. There will be no change in the anatomical structure of the eye, there will be no damage whatever whether he wears proper glasses or does not." (Tr. 38, 39)

"I think you would have a very difficult time in demonstrating that any person is definitely damaged by being supplied with glasses that are not perfect correction of his refractive error." (Dr. Benedict, dep. p. 41)

to examine the eyes, particularly where the examiners were not qualified to recognize, even if not treat, various diseases of the eye; and, in a more limited sense the health and welfare would be adversely affected if en masse the people wore improperly refracted eye glasses which impaired the over-all seeing ability and comfort of the spectacle wearing public.

Although much of the Act under cosideration constitutes a legitimate exercise of the legislative police power, this Court, without impliedly sanctioning all other portions of this Act, is of the opinion that this legislation in impact is unconstitutional at the following three points:

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Those portions of section 2, which make it unlawful for any person not a licensed optometrist or ophthalmologist, "To fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.

The unambiguous language of section 2 makes it unlawful, among other things, for either a dispensing or laboratory optician to take old lenses and place them in new frames and then fit the completed spectacles to the *face* of the eyeglass wearer except upon written prescription from a qualified eye examiner. Obviously, this serves to prohibit the wearers of eyeglasses from exchanging their frames either to obtain more modern designs or because the former frames are broken, without first visiting an ophthalmologist or optometrist; and, which in turn diverts from the optician a very substantial, as well as profitable, part of his business.[16]

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[16] As demonstrated by the evidence the dispensing optician has two things to sell, lenses and frames. If prospective purchasers of frames

The evidence indicates, almost without variance, that written prescriptions issued by the professional examiner contain no directive data in regard to the manner in which the spectacles are to be fitted to the face of the wearer. In addition, the Court is satisfied that the mere fitting of frames to the face, where the old lenses are available, is in reality only an incident to what fundamentally is a merchandising transaction, that is, the sale of a pair of frames; and, in any event, the knowledge necessary to perform these services is strictly artisan in character and can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist.

Although, as emphasized previously, the legislature can regulate the artisan, the merchant, or the professional where the regulated services embrace issues of public health and welfare, the services under consideration bear no real or rational relation to the actual vision of the public. *Prospective* wearers of eyeglasses are not affected inasmuch as a person seeking this particular service must already possess a pair of eyeglasses; and, *present* wearers of eyeglasses are not imperiled inasmuch as such wearers have previously submitted to examinations by professional men at the time the original pairs of spectacles were obtained.

It is most important to note that the flexibility of the human eye, with particular emphasis on the service now being discussed, is such as to assure the eyeglass wearing public of good vision even where succeeding frames when fitted to the face are not always fitted in the same manner. Dr. Tullos O. Coston, in testifying in regard to the actual refraction of the eye, accented the liberality which prevails in connection with visual correction:[17]

> "* "* * * What we aim to do in a refraction, I think that sometimes we get mixed up in technical

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are required to go to an ophthalmologist or optometrist to get an ophthalmic prescription, inasmuch as the optometrist fills all of his own prescriptions (and actually sells between 60-70% of the eyeglasses sold) the inevitable effect will be to deprive the optician of a sizeable amount of trade.

[17] (Tr.71-72).

things too much. The aim of proper refraction is first of all to have the best vision that the glasses will give the patient, plus comfort. Now if the glasses are fitted improperly, and a number of times that will be true, because the patient subjectively didn't give you the proper answers, or maybe the doctor was a little careless that morning, but if he gets the glasses and he sees well, and has no discomfort, suppose that a mistake had been made somewhere, it is of no importance. You fit the patient with glasses to make him see the best you can, with comfort. *Now technically whether you've got it on this axis or that axis is of absolutely no importance*, and you find people wearing the screwiest type of glasses, that when you get through examining them, your reading and your interpretation of what they need is exactly different to what they have worn, but they have been quite comfortable and they have seen well with what they have had.

"Now you have two choices. You can let them wear what they have, or you can give them a new pair of glasses, and very often we let them wear what they have had, if financial matters enter into it. *You can't say that the eye is like a piston in a cylinder, you don't have to fit it to that tolerance.* (Emphasis supplied)

If such be true in regard to the actual examination of the eyes for refraction, even more so such must be true in regard to the mere placing of original lenses in new frames and placing the frames to the face of the wearer. The legislature cannot control these specific functions, and in effect deprive opticians of their right to freely pursue a lawful calling, under the guise that such control is reasonably and rationally related to the health and welfare of the people.

The effect of section 2 which prohibits the duplication of existing lenses (that is, the preparation of a completely new set of spectacles) without a *written* prescription is also unconstitutional.

The evidence establishes beyond controversy that a skilled artisan (such as an optician) can accurately ascertain the power of a lense, or fragment thereof, without the aid of a

written prescription, and can thus duplicate or reproduce the original pair of spectacles without adversely affecting the visual ability of the eyeglass wearing public. This process requires no unusual professional judgment, peculiar to the licensed professions of ophthalmology and optometry but is strictly artisan in character. The power of the originally prescribed lense, or fragment thereof, can be learned by the use of a mechanical device known as the lensometer; this device (whether being operated by a professional or layman) scientifically measures the power of the existing lense and reduces it to prescriptive terms.[18]

Obviously, the accuracy of the lensometer operation is only commensurate to the care and skill exercised by the operator; and, logically, the vision of eyeglass wearers could be impaired somewhat by a careless commercial usage of this machine resulting in the mass production of lenses which were not accurate duplications of the original prescriptions.

Although on this precise issue of duplication, the legislature in the instant regulation was dealing with a matter of public interest, the particular means chosen are neither reasonably necessary nor reasonably related to the end sought to be achieved. As observed in the classic case of *Lawton* v. *Steele:* [19]

> "* * * To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that *the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.* (Emphasis supplied)

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[18] Significantly, the court in Palmer v. Smith (1948) 229 N.C. 612, 51 S.E. 2d 8, 11, concluded from the evidence there adduced: "It is undisputed on the record that a qualified optician can take a whole or broken lense and by use of a vertometer or lensometer, duplicate such lens with accuracy and exactness. The process of duplication is conceded to be a purely mechanical one."

[19] Fn. 11, supra.

It is absolutely unnecessary to delegate to professional men the control of and responsibility for the just-mentioned artisan tasks, where the opticians, as a group possess adequate skill to fully protect the vision of the public in accurately duplicating existing lenses. The operation of the lensometer does not rise to the need or dignity of exclusive professional supervision. A qualified witness demonstrated and testified that any reasonably intelligent person can be taught to operate the lensometer and become qualified to accurately learn the power of existing lenses, or fragments thereof, within several hours. As further demonstrated by the evidence, the opticians, as a class, have for a number of years used the lensometer in their trade and the optometrists and ophthalmologist use this same device when wishing to check the power of lenses; and, although only a minority of licensed ophthalmologists require a patient to return to the examiner's office to check the accuracy with which the original prescription has been filled, even in such instances the lensometer is not operated by the physician but by a clerk in the office.

The legislature has been guilty of undue oppression in failing to set up qualifying standards for the opticians, if such standards be necessary for the public protection, and at the same time arbitrarily legislating many of the skilled artisans out of a long recognized trade, by delegating the sole control of their skills and business to a professional group,[20] when the public can be completely protected without

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[20] The effect of section 2 is to place within the exclusive control of optometrists and ophthalmologists the power to choose just what individual opticians will be permitted to pursue their calling inasmuch as where the professional men must first give a written prescription and then "remain responsible for the full effect of the appliances so furnished by such other person" the ophthalmologists will pointedly refer their business to a limited number of channels, thus denying all other opticians the opportunity to follow their trade regardless how competently the remaining opticians are qualified. As shown by Dr. Coston's testimony: "Q. Doctor, I will ask you if under the law of Oklahoma, you are held liable for the glasses dispensed pursuant to a prescription of yours, will you issue prescriptions and permit them to be taken to any optician that patient might choose? A. No. Q. What will you do if that is the situation, assuming what I have said is the law? A. Patient will be directed to an optician I know to be reputable and reliable." (Tr. 51) Obviously, the optometrists will refer little if any business to the opticians inasmuch as they are competitors.

taking from the optician this valuable property right.[21]

Also, on this specific point under consideration, the legislature did not act in accordance with the requirement pronounced by Mr. Justice Sutherland in *Liggett Company* v. *Baldridge*:[22]

> "The act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary invasion of appellant's property rights guaranteed by the Constitution."

The means chosen by the legislature does not bear "a real and substantial relation" to the end sought, that is, better

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[21] If the function of the optician is such as to require licensing, the legislature can proceed to establish standards which must be met before an optician can be registered and forbid the practice of opticianary by non-registered opticians, just as has been provided in regard to pharmacists. (See 59 Okla. St. An. 331, et seq.) The action by the legislature in the instant act is as unreasonable as if pharmicists were divested of their right to do business by legislative action which delegated to physicians the absolute control and responsibility for accurate *compounding* of medical prescriptions for the reason that a physician alone is qualified to *prescribe* drugs for patients.

Obviously, the opticians do not possess qualifications which would enable them to become licensed ophthalmologists or optometrists. As observed in Smith v. Texas (1914) 233 U.S. 630, 638; "* * * in the exercise of the police power the State may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employe. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special and favored position. *Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.*" (Emphasis supplied) Cf. People v. Brown (1950) 407 Ill. 565, 95 N. E. 2d 688.

[22] Fn. 11, supra.

vision, inasmuch as although admittedly the professional eye examiners are specially trained in regard to eye examination, they possess no knowledge or skill superior to a qualified practicing optician insofar as the artisan tasks in view are concerned, and in fact the two professional groups, as a class, are not as well qualified as opticians as a class to either supervise or perform the services here regulated.

In addition, and of even more significance, is the fact that section 3 exempts from regulation all sellers of ready-to-wear glasses,[23] even though such sellers, from the viewpoint of public health and welfare, lie within the identical class and circumstance occupied by "fitters and sellers of frames" and "duplicators of lenses and entire spectacles."

The rule is clear that where the police power is ushered into play it must be exercised in an undiscriminating manner in relation to all persons falling within the same class or circumstance. This principle was enunciated in *Royster Guano Company v. Virginia* wherein the Court said:[24]

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. *But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.* * * *" (emphasis supplied)

In the instant legislation not only is the "relation to the object of the legislation" questionable (as previously discussed) but "all persons similarly circumstanced" pointedly have not been treated alike. Persons who sell frames (incidentally adapting and fitting the completed spectacles to the face), persons who duplicate original eyeglasses and market the duplicated spectacles, and persons who sell

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[23] See Fn. 4, supra.

[24] Fn. 12, supra, at 415.

ready-to-wear glasses are identically situated; that is, all are sellers of merchandise which is not immediately connected with or supervised by a professional eye examiner. Yet the public health and welfare is touched in the same manner and degree by each of these groups inasmuch as the possible result is exactly the same; people may wear spectacles which are not best suited for their eyes.

The legislature must not blow both hot and cold! If it be desirable for the public protection that opticians sell merchandise and service only upon written prescriptive authority, the legislature cannot at the same time permit the unsupervised sale of ready-to-wear (convex spherical lenses) eyeglasses. The mere fact the public selects at will from the counter serves as no basis for distinction; if such constitutes a distinction then the public should have the equal right to purchase new frames or duplicate prescription eyeglasses at will.

In reality, the unrestricted sale of ready-to-wear eyeglasses doubtless is more perilous than the practices prohibited by section 2. It is certain that the customer purchasing new frames, or duplicate lenses and frames, has at some time been to a qualified eye examiner, one qualified not only to refract the eyes but qualified also to recognize diseases of the eye; whereas, the purchaser of ready-to-wear eyeglasses has not even been provided with the safeguard of an initial examination.

An example of unlawful discrimination between business groups similarly situated but wherein the legislature artificially attempted to place the businesses in two different classes is found in the case of *People v. Weiner*, wherein the court in dealing with a statute which forbade the use of secondhand material in the making of mattresses (for sanitary reasons) but placed no such restriction in regard to the making of pillows, held that the attempted classification was arbitrary and unreasonable and in doing so said: [25]

> "Counsel * * * argue that there is a discrimination between the manufacturers and dealers in pillows and manufacturers and dealers in mattresses, comforters,

[25] Fn. 12, supra, at 873, 874.

and quilts, especially after they have been used, as there is no provision made as to pillows; that, so far as this act is concerned, material made secondhand in the same way as the material in the mattresses may again be made into pillows and sold without any regulation whatever. Under the decisions of this state this is class legislation (citing authorities). The provisions of sections 1 and 2 of the act are arbitrary and unreasonable, and must be held unconstitutional and void."

Inasmuch as there is no real difference between ready-to-wear spectacles and prescription eyeglasses, insofar as the public's need for properly fitted eyeglasses is concerned, to regulate prescription eyeglasses, as done in section 2, and yet expressly exempt ready-to-wear eyeglasses constitutes an unreasonable and discriminatory classification in contravention to the equal protection clause of the Fourteenth Amendment.

II

That portion of section 3 which makes it unlawful "to solicit the sale of * * * frames, mountings * * * or any other optical appliances."

As mentioned previously, the legislature has the authority to regulate and control "bait advertising", that is, advertising which not only tends to persuade the public to submit to eye examinations but also tends to result in the purchase of completed pairs of spectacles.[26] Clearly, it is

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[26] Fn. 14, supra. In approving that line of authority which holds that the legislature has power to regulate advertising by retail dealers of eyeglasses, the Court in the very recent case of State of Louisiana v. Rones, fn. 14, supra, at 105, commented: "* * * These courts have decided that the statutes are a reasonable exercise of the policy power because they prevent 'bait advertising' which attracts the unwary to purchase inferior glasses; eliminate the temptation to, and the pressure upon, customers that result from the assurance that no more than a named price will be charged; protect an uncautious and unwary public from being misled and deceived; prevent the increase in sales and the incidental harm that comes from unfitted eyeglasses; eliminate to some extent poor quality and poor workmanship which naturally result from the desire to sell spectacles

against the best interest of the public to have the number of eyeglasses worn determined by mercantile practices rather than the actual visual need of the people. Where advertising, which when uncontrolled, encourages such a condition the right of the legislature to supervise this segment of the field of visual care is identical with the legislature's right to supervise the fields of medicine and dentistry.[27]

Thus, any statute which regulates advertising in regard to eye examinations (that is, for eye diseases and for refraction, by one qualified to recognize, if not treat, diseases of the eye) or other advertising which promotes the sale of complete eyeglasses (particularly the original pair)[28] upon

in quantity at a low advertised price for the purpose of underselling competitors."

Advertising which tends to mislead the public into thinking the advertiser is qualified to practice professionally is likewise subject to regulation. See Curtis v. Registered Dentists of Oklahoma (1943) 193 Okla. 233, 143 P. 2d 427 wherein at 429, the Court said: "* * * we are of the opinion that it is apparent that it was the intention of the Legislature to protect the public from any person who might undertake to engage in the practice of dentistry without license to do so, and that part of its purpose was to prevent anyone other than licensed dentists supplying artificial substitutes for natural teeth to the persons who would use them. An examination of the stipulation of facts discloses that defendant, who had no license to practice dentistry, was engaged in the business of suppyling substitutes for natural teeth to the public at large through advertisements in the newspapers and the telephone directory which patently were designed to induce the public to believe that the defendant was authorized to engage in the practice of dentistry by supplying artificial substitutes for natural teeth."

[27] As mentioned in Semler v. Oregon State Board of Dental Examiners (1935) 294 U.S. 608, 612, 55 S. Ct. 570: "The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' The Legislature was aiming at * * * bait advertising. 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed dental work" was, as a general rule, the practice of the charlatan and the quack to entice the public. * * *'"

[28] This parenthetical observation is made because the Court believes that the primary basis of the legislative authority is the fact that the public

mere merchandising principles rather than in regard to the actual visual need, can be deemed rationally related to the public health and welfare. However, where a statute, such as the provision under consideration, intrudes into a mercantile field only casually related to the visual care of the public and restricts an activity which in no way can detrimentally affect the people, such an intrusion is unconstitutional.[29]

should not be induced to become eyeglass wearers under the same conditions they are induced to purchase ordinary mercantile commodities. Once a person has been properly examined and has become a spectacle wearer, advertising in regard to even a completed set of eyeglasses presents very little evil as to him although it may still be of public interest to control advertising, with accompanying competitive practices, which may result in the production of inferior optical merchandise and service.

[29] The effect of the instant statute, which even prohibits the display of frames in a show window, must be sharply distinguished from Commonwealth v. Kresge Co. (1929) — Mas. —, 166 N.E. 558, 560, 561, wherein the court said: "It seems to us that the statute here in question conforms to every requirement for validity thus laid down and is not obnoxious to any one of them. The defendant is undertaking to invade under the guise of private mercantile business a field rightly sequestered, by the Legislature in the interests of the public health (that is, the fitting to the eyes and sale of completed ready-to-wear spectacles) to those possessing special skill and training in a specified department of treatment of human ills."

In addition, although the field of visual care has been the object of *regulation* in regard to advertising (see fn. 14, supra) this Court knows of no instance where a legislature has utterly *prohibited* all forms of advertising, except the Louisiana Legislature. (See L.S.A.-R.S. 37:1041 et seq.) Significantly, the Louisiana Supreme Court in the Sones case, fn. 14, supra, at 106, although ruling that § 1063(9) of the Louisiana Act which prohibited any retailer from advertising optometric services or spectacles "as free or for a price," was constitutional, the Court by way of dictum remarked that as to § 1065 (the section completely prohibiting advertising of any form) "a plea of unconstitutionality might have merit." Distinguish the instant legislation from the issue in City of Springfield v. Burst (1944) — Ohio —, 56 N.E. 2d 185, 186 wherein a city ordinance was held constitutional which forbade "advertisement by newspaper, radio, display, or otherwise, *any statement advertising the price of lenses, or of complete eyeglassess*, including lenses, either with or without professional services or credit terms, installment payments or price plans, or the price of any frames or mountings, *unless in conjunction therewith the words, 'without lenses' appear in such manner to be clearly discernible, or read in such manner as to be clearly understood.*" (emphasis supplied); and, likewise distinguish Klein v. Department of Registration and Education (1952) — Ill. —, 105 N.E. 2d 758 which had to do with the restricting of certain kinds of advertising by optometrists.

Naturally, where a commodity being sold is so closely associated with the administration of medical treatment to a patient that the commodity itself becomes a mere incident to and actually a part of the medical treatment being rendered, becoming part and parcel of the professional judgment being exercised on behalf of the patient, then the commodity is subject to complete control and regulation; as observed by Mr. Chief Justice Hughes in *Semler v. Oregon State Board of Dental Examiners*[30] such a condition exists in dentistry:

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the market place."

However, this Court discerns utterly no analogy between the danger inherent in uncontrolled dental advertising, and advertising by dispensing opticians, or others, of various styles of frames, mountings and other modern and improved optical appliances, where such advertising omits the promotion and display of lenses or complete eyeglasses and makes no reference to eye examinations. Publicity limited strictly to frames can be deemed nothing more than straight merchandising inasmuch as it has no real relation to the vision of the public and should only be subject to those limitations recognized generally in regard to ethical mercantile advertising.

Inasmuch as a large majority of the eyeglass wearing public have more than one set of eyeglasses they are, from time to time in the market for new frames, not only to replace broken ones but to acquire those more modern in appearance as the frame has become an integral part of the present-day cosmetology. Advertising directed exclusively at this feature of eye wear can have no deleterious effect on the public, inasmuch as it has no influence on the

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[30] Fn. 27, supra, at 612.

prospective wearer of eyeglasses, and to the *present* wearer (a person already examined by a licensed professional) is but a mere piece of merchandise.

The dispensing optician, a merchant in this particular, cannot arbitrarily be divested of a substantial portion of his business upon the pretext that such a deprivation is rationally related to the public health.

III

That portion of section 4 which provides that: "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store".

Unquestionably the legislature has the authority to prohibit corporations from practicing Ophthalmology and Optometry in Oklahoma; and, insofar as section 4 moves inferentially toward such a goal, the legislature has acted within its authority.[31] As stated in *Sears Roebuck & Company, et al. v. State Board of Optometry.*[32]

> "In the clear and comprehensive opinion the chancellor examined the statutes, and said in part as follows: 'The weight of modern authority is against such arrangements as we have here (i.e. corporate practice in the field of optometry), and the question presented is whether the optometrist is working for the defendant companies as an employee, or for himself as a licensed and independent practitioner.
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> "'*It is only in the latter capacity that his status could be legal and his license authoritative in professional relation and service to the public.*'" (Emphasis supplied)

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[31] See fn. 5, Supra.

[32] — Miss. —, 57 So. 2d 726, 730 (1952).

And as recognized in *Neill et al. v. Gimbel Bros., Inc.*:[33]

> "* * * We cannot pronounce arbitrary or irrational the placing of optometry on a professional basis. This conclusion finds support in other jurisdictions. (citing cases)
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> * * *
>
> "* * * The legislature has the right to forbid such practice as contrary to public policy, which is properly concerned with the maintenance of high professional standards. *One who practices a profession is apt to have less regard for professional ethics and to be less amenable to regulations for their enforcement when he has no contractual obligations to the client, does not fix or receive the fees, and is under the control of an employer whose commercial interest is in the volume of sales of merchandise effected by the prescriptions of the employee-practitioner.*" (Emphasis supplied)

However, to forbid the renting or sub-leasing of quarters from retail merchants in order to enforce the legislative prohibition against corporate practice constitutes an arbitrary interference with the right of contract.

Concededly, as some of the cases illustrate, corporate practice has taken place where corporations sub-lease space to professional eye examiners. However, the correlation between the evil sought to be prevented and the one circumstance singled out and prohibited is not sufficient to authorize such a police power regulation. As mentioned in *Treigle v. Acme Homestead Association*:[34]

> "* * * Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

[33] 330 Pa. 213, 199 Atl. 178, 182 (1938).

[34] 297 U.S. 189, 197 — S. Ct. — (1936).

And as observed in *Indiana ex rel. Anderson v. Brand*:[35]

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end * * *"

We believe the means chosen in this particular instance is "arbitrary and oppressive" and not reasonably adapted to the accomplishment of the end sought, that is, the abolition of corporate practice in the professions of ophthalmology and optometry. As evidenced in the *Sears Roebuck & Company* case, supra, even though a leasing arrangement can be used to attempt to evade a corporate practice prohibition, nonetheless, the fact of statutory violation can be established by competent proof of the kind and character used to prove any other statutory breach.

Whether a professional man indulges in corporate practice, in violation of a statutory prohibition, is a matter of his individual integrity rather than his geographic location.

The instant prohibition is just as unreasonable as if the legislature, in order to aid in the enforcement of certain criminal statutes, banned the use of automobiles by the general public because law violators use automobiles in their illicit operations.

Conclusion

It is the opinion of this Court that the plaintiffs are entitled to a permanent injunction restraining and enjoining the defendants Mac Q. Williamson, Granville Scanland, Robert L. Wheeler, and all remaining County Attorneys in the State of Oklahoma from enforcing or attempting to enforce against the plaintiffs[36] the provisions of sections

[35] 303 U.S. 95, 108, — S. Ct. — (1938).

[36] The Court recognizes that the legislature has the authority to prevent "bait-advertising" and other evils associated therewith in the nature of corporate practice; and, that the instant plaintiffs at this time may be

2, 3 and 4 which have been designated as unconstitutional in this written opinion.[37]

Counsel should submit a journal entry to conform with this opinion within 15 days.

No. 6002-Civil

MURRAH, Circuit Judge, Dissenting in part:

With reluctance and some misgivings, I concur in that part of the judgment of the court declaring unconstitutional

engaged in practices which rightly can be prohibited by the legislature in a valid enactment; however, the legislature cannot, as here attempted, kill the patient in order to eliminate the disease.

[37] The Attorney General has not urged that the plaintiffs are not entitled to equitable relief even though certain provisions of the instant Act have an unconstitutional impact upon the plaintiffs. However, this Court is not unmindful of the cardinal principle that Federal courts of equity should not interfere with the processes of the criminal law in State courts or determine questions of criminal liability under these laws, unless in most exceptional circumstances in order to prevent irreparable loss. Beal v. Missouri Pac. R. Co. (1940) 312 U.S. 45, 50; and "* * * the imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified." Watson, et al. v. Buck, et al. (1941) 313 U.S. 387, 400. Cf. Spielman Motor Co. v. Dodge (1935) 295 U.S. 89, 95.

The plaintiffs' allegations, together with the undisputed proof, indicate that immediate and unrelenting enforcement of all the provisions of this Act, provisions clear in meaning and intent, by the defendant State officers, is imminent; in fact, defendants' counterclaim in this suit specifically demands injunctive relief against the plaintiffs as authorized by section 6 of the instant Act. The inevitable result of the enforcement of the provisions found by this Court unconstitutional in points I and II of the Opinion, as applied to the two dispensing optician plaintiffs, will be to literally put said plaintiffs out of business; unquestionably, from such an injury there can be no adequate remedy at law and that such will result is not conjectural but positive. The effect of the enforcement of the Act on the unconstitutional feature discussed in point III of the opinion, as applied to plaintiff, Dr. Rips, although not resulting in putting Dr. Rips clear out of business, will be to compel said plaintiff to relinquish a very desirable and valuable lease and to move to another place of business. Insofar as all plaintiffs are concerned no adequate remedy is available; the State cannot be held responsible for the business loss of the two dispensing optician plaintiffs or the loss of a lease by plaintiff Rips, valued at more than $5000; and, certainly a lessor cannot be held responsible for

the legislative prohibitions against fitting, adjusting, adapting or applying lenses, frames, prisms or other optical appliances to the face of a person, or duplicating or replacing the same without prescriptive authority of a licensed ophthalmologist or optometrist.

The obvious result of this legislation is to appropriate a property right of one class to follow a legitimate calling or occupation and to give it to another class not shown to be more competent in the public interest. Indeed, the evidence shows that it would be inimical to the public interest to re-

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cancelling a lease in conformity with a state criminal law requirement (notice of cancellation of which has already been given).

It is contrary to the spirit of reason as well as equity to direct these plaintiffs to choose between complying with all provisions of the instant Act, thus submitting to irreparable and irrecoverable business losses while the constitutionality of the provisions of the statute are tested; or, to continue in business, thus violating the clear language of the criminal law countless numbers of times each day in the hope that eventually such prosecutions will prove unsuccessful because of the unconstitutional nature of the criminal statute. Significantly, section 6 of the instant Act provides: "Any person, firm * * * violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished for each such offense, as provided by law * * *"; and, 21 Okla. Stat. Anno. § 10 states that "* * * every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding one year or by a fine not exceeding five hundred dollars, or both such fine and imprisonment. * * *" What facts could more pointedly justify the exercise of equitable authority than these,—where the plaintiffs are faced with both an injunctive prohibition and a liability for multiple criminal prosecutions. See Toomer v. Witsell (1947) 334 U.S. 385, 391. Also, see Parker v. Brown (1942) 317 U.S. 341, 349; Family Sec. Life Ins. Co. v. Daniel (D.C.S.C. 1948) 79 F. Supp. 62, reversed on other grounds 336 U.S. 220. As observed by the three judge court in Russo v. Reed (D.C. Mo. 1950) 93 F. Supp. 554, 558, in a case directly in point: "Equitable jurisdiction in the premises on the ground of a threatened irreparable injury is clear and imminent is obvious, for the loss of a season's fishing can not be restored, and the State of Maine provides no means for recovering damages in money to compensate for the loss occasioned by an illegal deprivation of the right to fish commercially within its coastal waters. (citing case) Nor do we see any occasion here for application of the doctrine of American Federation of Labor v. Watson, 327 U. S. 583 * * * for the Maine statutory provisions involved are clear and need no interpretation, and so far as we are aware no other special circumstance exists requiring the federal courts to stay action pending proceedings in the courts of the State."

quire the wearer of eye glasses to return to the ophthalmologist in order to obtain a prescription for the replacement or duplication of an eye glass, or to place the burden upon the ophthalmologist of merchandising frames and mountings and other appliances, or placing that purely commercial monopoly in the optometrist. There is no rational basis for depriving the optician of the right to perform this purely mechanical and commercial service to the public.

I cannot agree, however, that the legislature of the state may not constitutionally prohibit any person, firm, company, corporation or partnership from soliciting the sale of frames, mountings, prisms, or any other instrument deemed essential and used in the field of visual care by enumerated methods of advertising when it does so for the declared purpose of vouchsafing the "best possible visual care" to the public.

The effect of the order of the court is to make it unlawful to advertise the sale of spectacles, eye glasses or lenses but to allow any person, firm, company, corporation or partnership to solicit the sale of the empty frames, mountings, prisms and other appliances or devices. By this method one so engaged may circumvent the very evil to which the legislation is aimed, namely, prohibiting dishonest and dangerous practices in the sale of optical goods and devices.

There can be no doubt of the power of the legislature to regulate advertising practices of retail dealers of eye glasses. See State v. Rones, 67 So. 2d 99, and cases cited at Page 105. There may be good reasons for requiring the prohibition of advertising the sale of merchandise, the actual sale of which is not prohibited. Commonwealth v. Ferris, 25 N.E. 2d 378. It is true that all of the statutes which have been upheld as a valid regulation or restriction on the advertising of the sale of eye glasses have been judicially construed to apply to the furnishing of optometrical services or actual visual care, and not the mere sale of frames, mountings or fittings as merchandise. But I entertain no doubt of the power of the legislature to regulate the advertising of the empty frames, mountings and prisms and other optical devices if the object of such legislation is the prevention of fraud or mistake or to protect the public

against deceptive practices in the broad field of visual care. The power of the state to regulate or restrict advertising of a commercial business affected with a public interest has been upheld in a great variety of cases, including the sale of eye glasses. See Commonwealth v. Ferris, supra, at page 380; Commonwealth v. Nutting, 55 N.E. 895, affirmed 183 U.S. 553; Ritholz v. Commonwealth, 35 S.E. 2d 210.

Considered in isolation, an eye glass frame or mounting is no more than a mere piece of merchandise. But considered in the context of the total field of visual care, it takes on a significant relationship to the visual needs of the public and ceases to be a mere piece of merchandise to be dealt with in the market place on an arms length basis. As the dispenser of the completed eye glass the optician is a trained technician—the "right arm" of the ophthalmologist. As such he may be held to a standard more strict than the morals of the market place. Certainly the well-defined and legitimate functions he performs, both as a trained technician and a merchandiser, in the field of visual care are affected with a public interest, and the public may not be left to deal with him at arms length. And it is the same with the merchant optometrist. Certainly in the eyes of the public the optometrist is not seen in his dual capacity of a merchandiser as to whom he is required to deal at arms length and a professional in whom he can place his trust and confidence.

The challenged act is a legislative scheme to effect one declared public policy and each of its parts ought to be considered in pari materia in determining whether or not the legislature has acted beyond the scope of its broad and comprehensive police powers. Section 4 is pertinent, therefore, to the inquiry whether a valid constitutional basis can be found for prohibiting the advertisement of the merchandise not of itself related to visual care. Section 4 prohibits rebates, kick-backs, and solicitation by those selling optical goods, appliances or materials. And it forbids corporate practice. All of these we leave as proper subjects of police power. But the judgment of the court strikes down that part of the section which prohibits any retail establishment from renting space in its establishment to any person doing

eye examinations or visual care. This prohibition in the statute is said not to bear any reasonable relationship to the admitted power of preventing corporate practice, or for that matter any other practice deemed not in the public interest.

I agree that on its face it seems unreasonable and irrational to deny to the professional man quarters in a retail establishment. But to me the undisputed facts in this case point up the very evil to which the legislation is aimed.

Ellis Carp is the owner or is interested in eighteen optical establishments in Texas. All of them are dispensing opticians. He is also interested in a supply house in Dallas where lenses are ground on orders from the dispensing opticians. In Texas, Mr. Carp employs persons on salary to refract the eyes of those who are induced to come to his optical establishments. By this method the dispensing optician solicits the business, refers the customers to the salaried employee who does the refracting and prescribes for the visual correction. The prescription is returned to the optician for filling, fitting and adjusting. So, the optical company operating under a trade name actually performs the optical services constituting the very corporate practice which Oklahoma legislation condemns and prohibits.

In Oklahoma, Mr. Carp owns and operates the Douglas Optical Company in Tulsa in space rented from the Zale Jewelry Company. The Douglas Optical Company is a dispensing optical company which advertises by all of the media condemned in the challenged legislation. Soon after the Douglas Optical Company commenced business, Dr. Rips, a licensed ophthalmologist, and formerly in the employ of Carp in Dallas, came to Tulsa; conveniently rented space in the Zale Jewelry Company and set himself up in practice. Admittedly all of the members of the public seeking visual care, who are induced to come to Douglas by its advertisements, are referred to Dr. Rips, and while no one is compelled to take Dr. Rip's prescription to Douglas, "most of them go there because they generally come from there."

Mr. Carp is also the president of a corporation known as the Lee Optical Company with ground floor offices in the American National Building in Oklahoma City. It employs advertising media condemned and prohibited in the legisla-

tion. Soon after the Lee Optical Company opened for business in Oklahoma City, Dr. Conti formerly employed by Carp in Texas to refract eyes, came to Oklahoma City and established himself in offices on the third floor of the American National Building. All of the members of the public who are induced to come to the Lee Optical Company for visual care are referred to Dr. Conti whose prescriptions usually find their way back to Lee Optical Company for filling.

While neither Conti nor Rips is employed by Lee Optical Company or Douglas Optical Company, and neither of them rebates for the referrals, the reciprocal arrangements enable them to completely commercialize the whole field of visual care, which we agree is affected with a public interest and subject to legislative control.

Under the order of the court, Douglas may continue to occupy space in Zale's Jewelry Company in Tulsa. Dr. Rips may continue to occupy space under the same roof. The Douglas Optical Company may continue to advertise frames and mountings and other optical devices by radio, television, classified ads, and by any other commercial means. It will continue to attract the unsuspecting public, who not knowing the difference between an optician, ophthalmologist, or optometrist, will undoubtedly find their way to Dr. Rips, who having prescribed will see that they are returned to Douglas in order to complete the cycle.

The loophole which this judgment leaves in the legislative scheme is wide and in my judgment glaring. It is an unwarranted interference with the police power of the state over a subject with which the state is fully competent to deal. To borrow the language of Mr. Justice Holmes: "We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution

of the United States, judges should be slow to read into the latter a nolumus mutare as against the lawmaking power." Noble State Bank v. Haskell, 219 U.S. 104, 110.

In cases of this kind we ought to keep in mind the extremely limited restrictions that the due process clause of the Fourteenth Amendment places upon the states; and that federal courts should negatively inject themselves into the policy making powers of the states only in the presence of a palpable abuse of the due process clause of the constitution.

Sections 3 and 4 have uniform application and incidence to all affected thereby. There is no question of equal protection of laws involved. Only the question of due process under the Fourteenth Amendment is involved, and the basis of our jurisdiction is injunctive relief against the enforcement of a state statute with criminal sanctions. Before we rush in to strike down a part of the act, we ought to consider that due process in the state court is afforded to any person who would challenge any provision of the act by exposing himself to the criminal penalties involved. There is no more firmly established or salutary rule than the admonition against striking down the criminal laws of a state by federal injunctive process. Federal injunctive interference with the criminal laws of a state is justified only in exceptional circumstances and with a showing of great and immediate irreparable damage. Otherwise the accused should first set up a defense in the state court where his constitutional rights may be amply protected. See Watson v. Buck, 313 U. S. 387, 400. Reed v. Lehman, 91 F. 2d 919; Starnes v. City of Milledgeville, 56 F. Supp. 956.

I would certainly stay the federal hand in respect to the enforcement of Sections 3 and 4 of the act. As to Section 2, while I have some misgivings about injunctive relief, I am clear on the issue of constitutionality.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6002 Civil.

LEE OPTICAL OF OKLAHOMA, INC., a Corporation; ELLIS CARP, dba DOUGLAS OPTICAL; and ORAN RIPS, *Plaintiffs*,

vs.

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL., *Defendants*

Before MURRAH, Circuit Judge, and VAUGHT and WALLACE, District Judges.

JUDGMENT AND DECREE—Filed March 29, 1954.

This cause having come on for further and final hearing, and the issues therein having been tried before the Court without a jury, and the evidence of all of the parties hereto having been heard, and the cause having been argued and briefed by counsel, and the Court after being fully advised, having heretofore filed its written opinion herein, which opinion constitutes the Court's findings of fact and conclusions of law,

Now it is this date Declared, Ordered, Adjudged, and Decreed as follows:

(1) That the following portions of House Bill No. 953 (Title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma Statutes) are unconstitutional and void, to-wit:

(a) Those portions of Section 2 (Title 59, Chapter 24, Section 942, Oklahoma Statutes), which makes it unlawful for any person not a licensed optometrist or ophthalmologist "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical

appliances to the face of a person . . ." or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision . . ." except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist;

(b) That portion of Section 3 (Title 59, Chapter 24, Section 943, Oklahoma Statutes), which makes it unlawful "to solicit the sale of . . . frames, mountings . . . or any other optical appliances";

(c) That portion of Section 4 (Title 59, Chapter 24, Section 944, Oklahoma Statutes), which provides that "No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store".

(2) That the temporary restraining order entered in this cause on September 2, 1953, be and the same is hereby made permanent and perpetual against the defendants Mac Q. Williamson, Granville Scanland, Robert L. Wheeler, and the remaining defendants who are county attorneys in the State of Oklahoma, their agents, servants, employees, assistants, deputies and attorneys and all persons in active concert and participation with them, insofar as it restrains them from enforcing or attempting to enforce against the plaintiffs the provisions of House Bill 953 (Title 59, Chapter 24, Sections 941-947, Oklahoma Statutes) declared and adjudged unconstitutional and void herein, and they are hereby permanently enjoined from doing so.

(3) The temporary restraining order is further made permanent and perpetual against the defendant Zales Jewelry Company, a corporation, insofar as the same restrains the said defendant from cancelling or terminating its lease to plaintiff Rips on the ground of violation of the provisions of House Bill 953 (Title 59, Chapter 24, Sections 941-947, Oklahoma Statutes), declared and adjudged un-

constitutional and void herein, and it is hereby permanently enjoined from doing so.

(4) The plaintiffs and their surety are forever discharged and released from any and all liability by reason of their restraining or injunction bond given in this cause and the *sae* is for naught held.

(5) The counterclaim of the defendant county attorneys and attorney general is held in abeyance, but jurisdiction of this cause is retained for the purpose of giving full effect to this judgment and for the purpose of making such further and other orders and decrees, or taking such further action, if any, as may become necessary or appropriate to carry out and enforce the Court's judgment.

(6) The costs of this action are hereby assessed against the defendant county attorneys and attorney general.

DATED at Oklahoma City, Oklahoma, this 29 day of March, 1954.

(S.) W. R. WALLACE,
Judge.

(S.) EDGAR S. VAUGHT,
Judge.

(7002)

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Nos. 184 and 185

IN THE

Supreme Court of the United States

October Term, 1954

No. 184

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al, *Appellants,*

v.

LEE OPTICAL OF OKLAHOMA, INC., et al

No. 185

LEE OPTICAL OF OKLAHOMA, INC., et al, *Appellants,*

v.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al.

On Appeals From the District Court of the United States For the Western District of Oklahoma

BRIEF FOR THE AMERICAN OPTOMETRIC ASSOCIATION, INC. AS AMICUS CURIAE

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INDEX

Page

The Interest of the American Optometric Association, Inc. 1

Statute Involved 4

Summary of Argument 4

Argument 8

I. The Challenged Portions of Section 2 of the Oklahoma Act Do Not Offend Any Provision of the Federal Constitution 14
Due Process 14
Equal Protection 30

II. The Challenged Portions of Section 3 of the Oklahoma Act Do Not Offend Any Provision of the Federal Constitution 34
Due Process 34
Interstate Commerce 44

III. The Challenged Portions of Section 4 of the Oklahoma Act Do Not Offend Any Provision of the Federal Constitution 48

Conclusion 55

Appendix 56

CITATIONS

CASES:

Abelson's Inc. v. New Jersey State Board of Optometrists, 5 N.J. 412, 75 Atl. (2d) 867, 22 A.L.R. (2d) 929 ..... 18, 39

American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 ..... 30, 33

Baccus v. Louisiana, 232 U.S. 334 52

Breard v. Alexandria, 341 U.S. 622 ..... 27, 33, 46

City of Springfield v. Hurst, 144 Ohio St. 49, 56 N.E. (2d) 185 ..... 14, 18, 21, 38, 52

Commonwealth v. Ferris, 305 Mass. 233, 25 N.E. (2d) 378 ..... 14, 18, 21, 24, 35, 38, 39

Page

Commonwealth v. S. S. Kresge Co., 267 Mass. 145, 166 N.E. 558 ..... 14, 18, 24
Crane v. Johnson, 242 U.S. 339 17
Curtis v. Registered Dentists of Oklahoma, 193 Okla. 233, 143 P. (2d) 427 ..... 24, 35, 39
Curtis v. State, 78 Okla. Cr. 282, 142 P. (2d) 465 ..... 24, 35, 40
Daniel v. Family Security Life Insurance Co., 336 U.S. 220 ..... 12, 33, 48
Dent v. West Virginia, 129 U.S. 114 ..... 17, 54
Dr. Bloom Dentist, Inc. v. Cruise, 259 N.Y. 358, 182 N.E. 16, (appeal dismissed, 288 U.S. 588) 17, 39
Douglas v. Noble, 261 U.S. 165 17
Graves v. Minnesota, 272 U.S. 425 17
Hayman v. Galveston, 273 U.S. 414 ..... 17, 30, 49
Harris v. State Board of Optometrical Examiners, 287 Pa. 531, 135 Atl. 237 52
Kindy Opticians, Inc. v. Michigan State Board of Examiners, 291 Mich. 152, 289 N.W. 112 ..... 14, 39
Klein v. Dept. of Registration and Education, 412 Ill. 75, 105 N.E. (2d) 758; Cert. den. 344 U.S. 855 ..... 17, 24, 38, 39
Lasdon v. Hallihan, Director of Registration and Education, 377 Ill. 187, 36 N.E. (2d) 277 ..... 35, 39
Liggett Company v. Baldridge, 278 U.S. 105 7
Lincoln Federal Labor Union v. Northwestern I. & M. Co., 335 U.S. 525 ..... 7, 13, 33
Lorain Journal Co. v. United States 342 U.S. 143 45
McNaughton v. Johnson, 242 U.S. 344 ..... 17, 30, 49
N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 30
Neill v. Gimbel Bros., Inc., 330 Pa. 213, 199 A. 178 ..... 14, 18, 50
N. J. State Board of Optometrists v. S. S. Kresge Co., 113 N.J.L. 287, 174 A. 353 ..... 14, 18
Norwood v. Parenteau, S. Ct. S. D. (1954) 63 N.W. (2d) 807 ..... 38, 40
Packer Corp. v. Utah, 285 U.S. 105 ..... 46, 47
Palmer v. Smith, 229 N.C. 612, 51 S.E. (2d) 8 14
Parker v. Brown, 317 U.S. 341 46
Railway Express Agency v. New York, 336 U.S. 106 ..... 13, 46, 51

Page

Ritholz v. Arkansas State Board, 206 Ark. 671, 117 S.W. 410 ..... 14, 18, 50
Ritholz v. City of Detroit, 308 Mich. 258, 13 N.W. (2d) 283 39
Ritholz v. Commonwealth of Virginia, 184 Va 329, 35 S.E. (2d) 210 ..... 14, 18, 39, 40, 50
Ritholz v. Indiana State Board, 45 F. Supp. 423 (N.D. Ind.) 17
Roberts Optical Co. v. Dept. of Registrations and Education, No. 33139, S.Ct. of Illinois, decided Oct. 24, 1954 35
Roschen v. Ottinger, 29 F. (2d) 762 (S.D. N.Y.) ... 17, 25
Roschen v. Ward, 279 U.S. 337 .... 5, 14, 17, 18, 19, 24, 26, 32, 33, 42, 49, 51
Rowe v. Standard Drug Co., 132 Ohio St. 629, 9 N.E. (2d) 609 ..... 14, 18, 50
Saunders v. Swann, 155 Tenn. 210, 292 S. W. 458 .. 52
Sears, Roebuck & Co. v. State Board of Optometry, 213 Miss. 710, 57 So. (2d) 726 ..... 14, 17, 50
Seifert v. Buhl Optical Co., 276 Mich. 692, 268 N.W. 784 ..... 3, 14, 18, 38, 39
Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 ..... 7, 17, 30, 36, 39, 46, 49, 50, 52, 54
So. Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 46
State v. Goodman, 206 Minn. 203, 288 N.W. 157 14
State v. Kindy Optical Co., 216 Iowa 1157, 248 N.W. 332 ..... 14, 18, 50
State v. Rones, 223 La. 829, 67 So. (2d) 99 .. 14, 18, 35, 38
State v. Salt Lake Tribune Publishing Co., 68 Utah 187, 249 Pac. 474 47
State Board of Dental Examiners v. Miller, 90 Colo. 193, 8 P. (2d) 699, appeal dismissed 287 U.S. 563 ..... 17, 49, 50
State ex rel. Beck v. Goldman Jewelry Co., 142 Kan. 881, 51 P. (2d) 995 ..... 14, 18, 50
State ex rel. Bricker v. Buhl Optical Co., 131 Ohio St. 217, 2 N.E. (2d) 601 50
State ex rel. Loser v. National Optical Stores Co., 189 Tenn. 433, 225 S.W. (2d) 263 ..... 14, 51

Page

State ex rel. Sisemore v. Standard Optical Co. of Oregon, 182 Or. 452, 188 P. (2d) 309 38
Watson v. Maryland, 218 U.S. 173 .....17, 30
Whitaker v. North Carolina, etc., 335 U.S. 542 ....33, 42

STATE STATUTES:

Code of Alabama (1940) Title 46
Sec. 209 31
Sec. 211 .....36, 43
Arizona Code Annot. (1939) Sec. 67-1407 31
Arkansas Stats. Annot. (1947)
Sec. 72-801 29
Sec. 72-815 36
Sec. 72-819 31
Deering's California Codes (Business and Professions) (1944)
Sec. 3041 29
Sec. 3042 29
Sec. 3043 31
Sec. 3129 43
Secs. 3120, 3130 36
Colorado Stats. Annot. (1935) c. 120
Sec. 1 29
Sec. 19 31
Secs. 21, 22 36
Delaware Code Annot. (1953), Title 24
Sec. 2113 43
Sec. 2117 31
D. C. Code Annot. (1951) Sec. 2-520 31
Florida Stats. Annot. (1952)
Sec. 463.01 29
Sec. 463.14 .....36, 43
Sec. 463.16 31
Code of Georgia Annot. (1937) Sec. 84-1108 31
Idaho Code Annot. (1948)
Sec. 54-1501 29
Sec. 54-1512 43
Sec. 54-1515 31
Sec. 54-1517 29
Jones Illinois Stats. Annot. (1953 Cum. Supp.)
Sec. 94-20 31
Sec. 94.29(m) 43

Page

Burns Indiana Stats. Annot. (1951)
Sec. 63-1019(c) 29
Sec. 63-1019(d), (f) 36, 43
Iowa Code Annot. (1949)
Sec. 154.2 31
Sec. 154.9 29
General Stats. of Kansas Annot. (1949) 65-1504(h) 36
Kentucky Rev. Stats. (1953)
Sec. 320.010(4) 31
Sec. 320.020(4), 320.080(2)(d)(e) 36, 43
Louisiana Rev. Stats. (1950)
Sec. 1941(3) 29
Sec. 1063(9) 36, 43
Sec. 1065 ..... 29, 31
Rev. Stats. of Maine (1944) C. 69
Sec. 6 III 29
Sec. 6 IV, 7 29
Sec. 7 31
Sec. 14 V 43
Annot. Code of Maryland (Flack 1951) Art. 43
Sec. 358 43
Sec. 362 31
Annot. Laws of Mass. (1949) c. 112
Sec. 73 31
Sec. 73A 36, 43
Mich. Stats. Annot. (1937) c. 123
Sec. 14.647(d) 31
Sec. 14.648(h) 36, 43
Minn. Stats. Annot. (1946) Sec. 148.57 sub. 3 43
Mississippi Code Annot. (1942) Sec. 8846 31
Vernon's Annot. Missouri Stats. (1952)
Sec. 336.110 (1) (5) 44
Sec. 336.120 (3) 31
Sec. 336.200 36
Rev. Codes of Montana (1947)
Sec. 66-1302 (9) 29
Sec. 66.1302 (11) 36, 43
Sec. 66.1316 31
Rev. Statutes of Nebraska (1943)
Sec. 71-1, 134 31
Sec. 71-147, Sec. 71-148 44

Page

Nevada Compiled Laws (1929)
Sec. 4966(c) 29
Sec. 4980 31
Sec. 4982 (a) (d) 43
Rev. Laws of New Hampshire (1942) c. 253, sec. 13.. 31
New Jersey Stats. Annot. (Supp. 1953)
Sec. 45:12-11 (j) (p) (r) 43
Sec. 45:12-19 36
New Mexico Stats. Annot. (1941)
Sec. 51-702 29
Sec. 51-703 29
Sec. 51-713 (j) 29
Sec. 51-713 (k) (m) 43
Sec. 51-713 (k) (l) (m) 36
Sec. 51-714 31
General Stats. of North Carolina
Sec. 90-115 29
Sec. 90-124 31
Sec. 90-124(3) 43
North Dakota Rev. Code of 1943 (Supp. 1953)
43-1302 31
Page's Ohio General Code
Sec. 1295-21, 1295-22 29
Sec. 1295-34 31
Okla. Stats. Ann., Title 59, Sec. 941-947 4
Oregon Compiled Laws Annot. (1940)
Sec. 54-701 29
Sec. 54-702 31
Sec. 54-722 29
Sec. 54:73(6) (1943 Supp.) 43
Purdon's Penna. Stats. Anno. Title 63, sec. 240 31
General Laws of Rhode Island (1938) c. 277, sec. 11. 43
Code of Laws of South Carolina (1952)
Sec. 56-1075 36
Sec. 56-1083 31
Supp. to South Dakota Code of 1939
Sec. 27.0701 29
Sec. 27.0707 43
Williams Tennessee Code Annot. (1934)
Sec. 7027(1) 29
Sec. 7027(1)—7028 29
Sec. 7028 ..... 31, 43, 44

Page

Vernon's Texas Civil Stats., Articles 4552, 4565 d, 4566 31
Utah Code Annot. (1953)
58-16-11(4) 29
58-16-13(3) 31
58-16-14(5) 43
Vermont Stats. (1947 Revision) sec. 6883 31
Code of Virginia (1950)
Sec. 54-369 31
Sec. 54-396 (4) (6) (9) 36
Sec. 54-396 (9) 43
Sec. 54-396 (10) 29
Remington's Rev. Stats. of Washington (Supp. 1940)
Sec. 10147 29
Sec. 10152 (10) (13) (15) 44
Sec. 10152 (10) (15) 36
Sec. 10152 (12) 43
Sec. 10159 31
West Virginia Code of 1950 (Annot.)
Sec. 2931 (d), 2933 29
Sec. 2933 (d) 31
Sec. 2937 43
Wisconsin Stats. (1953) c. 153
Sec. 153.02 (2) 31
Sec. 153.10 . . . . . 36, 43
Wyoming Compiled Stats. (1945)
Sec. 37-1802 . . . . . 29, 31
Sec. 37-1807 36
Sec. 37-1807 (c) 43

MISCELLANEOUS

Rules of Practice of the American Optometric Association 40

IN THE

Supreme Court of the United States

October Term, 1954

No. 184[1]

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al, *Appellants*,

v.

LEE OPTICAL OF OKLAHOMA, INC., et al.

On Appeals From the District Court of the United States For the Western District of Oklahoma

---

BRIEF FOR THE AMERICAN OPTOMETRIC ASSOCIATION, INC. AS AMICUS CURIAE

THE INTEREST OF THE AMERICAN OPTOMETRIC ASSOCIATION, INC.

This brief amicus curiae is submitted on behalf of the American Optometric Association, Inc. with the consent of the parties.

The American Optometric Association, Inc., organized in 1897 and incorporated in 1918 as a non-profit membership corporation under the laws of the State of Ohio, is the

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[1] Together with No. 185, *Lee Optical of Oklahoma, Inc., et al.* v. *Mac Q. Williamson, Attorney General of the State of Oklahoma, et al.*

national organization representing the profession of optometry, having a membership of approximately 70% of all eligible practicing optometrists in the country.

The optometrist is the only practitioner especially and exclusively trained to examine and refract the eyes of his patient for defects in vision. The practice of optometry has been defined to be the science and art devoted to the examination of the eyes, the analysis of the ocular functions and the employment of preventive and corrective methods and agents of an optical and photic character for the relief of visual and ocular abnormalities. The profession of optometry, as it has grown and as it is now constituted, is a single, complete and unified service, consisting not only of the examination and refraction of the eyes, but also of the prescribing and furnishing of eyeglasses or vision training, or both, as may be found necessary by the optometrist.[2] The Supreme Court of Michigan has pointed out that:

> optometry has become a real science devoted to measurement, accomodation, and refractory powers of the eye without the use of drugs, thus superseding obsolete and mechanical methods of fitting eyeglasses. It has become one of the important professions, and for the preparation of its proper practice courses in op-

---

[2] The ophthalmologist is a physician who has taken post graduate work in the eye and has passed examinations given by the American Board of Ophthalmology. He is specially trained to perform eye surgery and to treat diseases of the eye. He is accredited and is a diplomate in ophthalmology.

The occulist is also a physician, who, on his own, has decided to specialize in the eye. He usually practices, in addition, the specialties of the ear, nose, and throat. For the purposes of this case, no distinctions will be drawn between the ophthalmologist and the oculist. The ophthalmologist and the oculist usually write prescriptions for eyeglasses; they do not ordinarily fill the prescriptions or provide the glasses themselves.

The optician, sometimes called a dispensing optician or an ophthalmic dispenser, is a mechanic who fills the prescriptions for eyeglasses written by the ophthalmologist or oculist. The optician is not qualified to examine the eye or to write prescriptions for eyeglasses.

> tometry, physics, physiology, pathological conditions of the eye, the proper use of the retinascope, ophthalmometer, ophthalmoscope, refractor, prisms, lenses, etc., are given as part of the curriculum in many of our largest universities as well as colleges specializing in optometry. The legislatures throughout the entire country have recognized that the proper practice of this profession is of the most vital importance to the public, and have made due provisions, not only for the licensing of optometrists after proper examination, but for regulating the proper practice of the profession. (*Seifert* v. *Buhl Optical Co.*, 276 Mich. 692, 697-98, 268 N.W. 784, 786).[3]

In the past fifty years, the profession of optometry has kept pace with the onrush of progress in other fields. In this nuclear age of supersonic speeds, the requirements of vision and the practice of the profession are as different as the jet plane is from the horse and buggy. For example, the enormous increase in recent years in the number of operators of motor vehicles on the public highways—dangerous instrumentalities in the hands of those with poor vision—suggests the existence of an evergrowing need for more effective use of the police power in an area where appropriate legislation not only is of direct benefit to the many individuals involved, but also promotes the public safety. And, for example, tolerances in a number of industries are measured with far greater accuracy than was formerly the case, making greater demands on human vision. It is not necessary to list other facts to prove the vital public concern in the field of visual care.

From its inception, the purposes of the American Optometric Association, Inc. were, and still are, to protect and conserve the vision of the public; to render the best possible service to the vision of the public in the light of discovery and invention; to elevate the standards and practice of the profession; and to protect the public health,

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[3] The court below, at one point in its opinion (R. 37, n. 3), inadvertently referred to the optometrist as a "quasi-professional." But see R. 41.

safety and welfare from the danger and injury caused by the untrained, the unqualified, the unethical, and the unprofessional.

The Association has been, and continues to be, interested in legislation and litigation affecting the practice of the profession of optometry and the field of visual care. It constantly guides and counsels toward greater professional status, attainment, and achievement, through better education and through the enactment of salutary legislation for the public and the profession.

The American Optometric Association, Inc. has a vital interest in the matters before the Court in this case. The decision of the court below, holding invalid portions of the Oklahoma law relating to visual care, is, we believe, a long step backward. The decision, if affirmed by this Court, would, as we point out in detail, *infra*, invalidate similar provisions in the statutes of many other states, and would cast doubt on the validity of other related provisions in the laws of still other states. Also the authority of many of the decisions of some of the highest state courts would be put in question, and, in our view, the chaotic conditions in the field of visual care that would result could only mean substantial retrogression in this field with resulting damage to the health and welfare of the people of the country, a result which the American Optometric Association, Inc., is pledged to prevent, so far as it is able to do so. The Association's interest in this case is real.

STATUTE INVOLVED

The pertinent provisions of Oklahoma Enrolled House Bill No. 953 (Okla. Stats. Ann., Title 59, §§ 941-947) are set forth in the Appendix, *infra*, pp. 56-58.

SUMMARY OF ARGUMENT

The American Optometric Association, Inc., contends that all of the provisions of the Oklahoma visual care legislation here involved are constitutional. The legislation

was enacted by the Oklahoma legislature pursuant to the State's police power in the interest of the public health and welfare. In holding certain provisions of this legislation invalid, the court below failed to apply the well-settled applicable principles that such legislation is presumed to be valid and cannot be annulled unless it is arbitrary and unreasonable and without any rational basis. If the court below had not improperly substituted its judgment for that of the Oklahoma legislature as to the wisdom of the legislation, it would have found no provision of the Oklahoma law in violation of the federal constitution.

I

The court below erred in holding invalid, under the due process clause, those portions of section 2 of the Oklahoma Act which prohibited, except upon written prescription of a qualified Oklahoma eye examiner, (1) the fitting, adjusting, or adapting of lenses, frames, etc. to the face of a person, and (2) the duplication of lenses or other optical appliances. The validity of those provisions of section 2 should have been sustained on the authority of this Court's decision in *Roschen* v. *Ward*, 279 U. S. 337, which upheld a New York statute making it unlawful to sell eyeglasses at retail in any store unless a licensed physician or optometrist was in charge of and in personal attendance at the place where the glasses were offered for sale. The statute was applied in the *Roschen* case to the sale of ready-to-wear store glasses. The court below did not distinguish *Roschen;* instead it pointed out that the situation sought to be controlled in that case and in the instant case were identical insofar as effect on the public health was concerned. The court's failure to find the *Rochen* decision controlling here is incomprehensible.

Moreover, apart from the authority of the *Roschen* decision, the court below should have sustained the validity of Section 2 on principle, because of its close relationship

to the public health and welfare. When lenses are duplicated or glasses or frames are fitted to one's face, the really important consideration is whether the glasses are proper and suitable for the wearer. No matter how expert an optician may be in adjusting or fitting glasses or in duplicating lenses, he is not qualified to determine whether a particular pair of glasses is appropriate for the wearer. Only a prescription from an optometrist or a physician can give the optician that information, and the purpose and effect of the section are to make sure that such information is available before glasses are adjusted or fitted or lenses duplicated. Section 2 in no sense legislates opticians out of a trade, or transfers business elsewhere. Opticians are still free to ply their trade, but only in the public interest pursuant to a prescription of a professional optometrist or physician.

The reasonableness of the requirements of section 2 is evidenced by the facts that seventeen other states have enacted legislation specifically prohibiting the duplication of ophthalmic lenses without a prescription from a licensed ophthalmologist or optometrist and that twelve other states include in their definition of the profession of optometry the adjusting, fitting, etc. of lenses and other optical appliances and provide that this cannot be done by one not an optometrist or physician, except on prescription.

The court below erred also when it held section 2 invalid on the further ground that it violated the equal protection clause of the Fourteenth Amendment because of an exemption in favor of sellers of ready-to-wear glasses sold as merchandise (as distinguished from prescription glasses). A state need not strike at all evils at once or in the same way and it is for the legislature, not the courts, to determine which evils the law should protect against. The reasonable basis for the judgment of the Oklahoma legislature is evidenced by the fact that the legislation of thirty-nine states and the District of Columbia contains similar exemptions. While such exemptions are valid,

the American Optometric Association, Inc., as a matter of policy, would prefer that such exemptions be eliminated from state laws and that the sale of ready-to-wear glasses be regulated also.

II

The advertising restrictions contained in section 3 of the Oklahoma act, making it illegal to solicit the sale of spectacles, eyeglasses, lenses, frames, mountings etc. are clearly constitutional and do not violate the due process clause of the Fourteenth Amendment. In the field of public health, the state is concerned with providing safeguards against deception of the public and against practices that might tend to demoralize the health professions by forcing members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. See *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608. The highest courts of the states which have considered the problem have upheld advertising restrictions in the field of visual care. And for such legislation to be effective it must necessarily include within its scope the merchant optician as well as the professional optometrist and physician. The court below invalidated the advertising limitations only insofar as they related to the sale of "frames, mountings, * * * or any other optical appliances," being of the opinion, apparently, that there is some significant difference, with respect to effect on the public health, between advertising frames as distinguished from eyeglasses. But there is no such distinction. Frames are purchased to be worn with lenses as complete eyeglasses. That is the only purpose of frames. The legislation of many states which limits advertising includes frames, mountings and other optical appliances within its scope.

The advertising restrictions of section 3 do not violate the interstate commerce clause because they prohibit advertising by radio, newspapers and other media

of interstate communication. The regulation is essentially a local regulation; it does not discriminate against interstate commerce, and any effect it might have on such commerce is purely incidental and in violation of no known national regulations or policies. The decisions of this Court make it clear that section 3 does not violate the commerce clause.

III

The court below erred in holding invalid that portion of the Oklahoma Act which provides that "no person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store." The restriction is not "arbitrary and oppressive" as the court below held. Rather, it is most reasonable and is closely related to the public health and welfare. The practice of medicine or optometry by commercial interests is a conceded evil which the state can prohibit. The restriction of section 4 closes one loophole in efforts to evade the concededly valid prohibition against corporate practice and, in addition, reduces the incentive on the part of mercantile interests to enter into illicit business arrangements. Moreover, the state has an interest in seeing that the health professions are not practiced in retail stores, in order to protect against incompetence and lack of ethics in the professional service.

ARGUMENT

The court below, a three-judge federal district court specially constituted pursuant to the provisions of 28 U. S. C. 2281, held that certain provisions of Oklahoma Enrolled House Bill No. 953, relating to visual care (Okla. Stats. Ann., Title 59, §§ 941-947), which were enacted pursuant to the police power of the State of Oklahoma, violated the Constitution of the United States. It held

invalid under the due process and equal protection clauses of the Fourteenth Amendment those portions of section 2 of the Oklahoma Act which make it unlawful for any person not a licensed optometrist or ophthalmologist, "To fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of any Oklahoma licensed ophthalmologist or optometrist. R. 44-53. It also held that that portion of section 3 of the Oklahoma Act which makes it unlawful "to solicit the sale of * * * frames, mountings * * * or any other optical appliances" violated the due process clause (R. 53-58) and that that part of section 4 which provides that "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sub-lease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store" violated the due process clause and constituted "an arbitrary interference with the right of contract." R. 58-60. Judge Murrah dissented from these last two holdings. R. 62-68. The correctness of the court's holdings is now before this Court for consideration in the appeal in No. 184. R. 31-33. In addition, in No. 185, plaintiffs allege that the court below erred in limiting its decision with respect to section 3 to "frames, mountings * * * or any other optical appliances" and should have also held invalid those additional provisions of section 3 which make it unlawful to solicit the sale of "spectacles, eyeglasses, lenses, * * * (or) prisms."[4] R. 34-35.

[4] Inasmuch as there are two appeals and in order to avoid confusion, we shall continue to refer to the plaintiffs and defendants below as plaintiffs and defendants herein.

The American Optometric Association contends that all of these contested provisions of the Oklahoma Act are clearly authorized under the police power of the State of Oklahoma, that they offend no provisions of the federal constitution, and that, accordingly, the court below should have dismissed the complaint.

The legislation here involved was concededly enacted by the Legislature of the State of Oklahoma pursuant to the police power of the State. It had as its purpose the furtherance of "the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care" (Section 1 of the Oklahoma Act), a concededly legitimate and valid concern of the State of Oklahoma. The court below held, nonetheless, that the provisions of Sections 2, 3 and 4 of the Oklahoma Act, already referred to, were invalid and beyond the constitutional authority of the State to enact, and the principal question, in our opinion, that this case presents to this Court concerns the practical application of the well-settled doctrines relating to the permissible scope of judicial scrutiny, under the federal constitution, of state legislation so enacted for the public good. We say that the case involves the practical application of the doctrines, because we do not think that the doctrines themselves are, or can be, in question or dispute. The difficulty is that the court below merely paid lip service to the doctrines it stated; it lost its way, we believe, when it undertook to apply them in this case.

"It is recognized, without citation of authority," the court below observed, "that all legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not by decision invalidate an enactment merely because in the court's opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where

the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. A court can only annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory." R. 39-40. If the court below had actually applied the principles which it stated, it would not have fallen into the grievous error of striking these provisions of the Oklahoma law as unconstitutional.[5] We suggest that the court below, although it stated the bare legal formula accurately, did not fully appreciate its significance in application and adopted a "due process philosophy that has been deliberately discarded" by this Court. *Lincoln Federal Labor Union* v. *Northwestern I. & M. Co.*, 335 U. S. 525, 537.

This is evidenced, in our view, by the court's reliance on the 1928 decision of this Court in *Liggett Company* v. *Baldrige*, 278 U. S. 105. The *Liggett* decision, it will be recalled, held invalid, over the dissent of Justices Holmes and Brandeis, a Pennsylvania statute which required owners of drug stores to be licenses pharmacists, and, in the case of corporations or other associations, required that all members or partners thereof similarly be licensed pharmacists. The statute was held to contravene the due process clause of the 14th Amendment because it was thought to be unreasonable and arbitrary, and its requirements were thought to bear no reasonable relationship to the public health, such relationship, if any, resting on mere conjecture.[6] The court below relied on the *Liggett*

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[5] "Even where the social undesirability of a law may be convincingly urged, invalidation of a law by a court debilitates popular democratic government. * * * Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people." Mr. Justice Frankfurter, concurring in *Lincoln Federal Labor Union* v. *Northwestern I. & M. Co.*, 335 U. S. at 553.

[6] Mr. Justice Sutherland reviewed the various other statutory provisions enacted by Pennsylvania to protect the public in the purchase of drugs and medicines and concluded that "In the light of the various requirements of the Pennsylvania statutes, it is

decision for the proposition that the effect of legislation such as here involved must bear a reasonable relation to the purpose to be accomplished (R. 43) and must not constitute an arbitrary invasion of a person's property rights. (R. 50-51). But the authority of the *Liggett* case is extremely doubtful today. In *Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, decided in 1949, this Court was concerned with the validity of a South Carolina statute which prohibited life insurance companies and their agents from operating an undertaking business and prohibited undertakers from serving as agents for life insurance companies. It was urged upon the Court that the statute was arbitrary and unreasonable and violated the due process and equal protection clauses of the Fourteenth Amendment. The Court, however, recognized the plea as an argument for invalidity on the ground that the Court should disagree with the desirability of the legislation. The Court stated however: "We are not equipped to decide desirability, and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature." 336 U. S. at 224. The Court was unable to say that South Carolina was "not entitled to call the funeral insurance business an evil"; nor could it say that the statute had no relation to the elimination of those evils. And there its "inquiry must stop." (Ibid.) The

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made clear if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business." 278 U. S. at 113. Mr. Justice Holmes, in his dissent, pointed out that a licensed pharmacist owner would more likely observe the business "with an intelligent eye," and that the Constitution does not require that preventive legislation "work a perfect cure," it being sufficient if it has a "manifest tendency to cure or at least to make the evil less," and he concluded "that the police power as that term has been defined and explained clearly extends to a law like this, whatever I may think of its wisdom." 278 U. S. at 114-115.

Liggett decision was urged upon the Court as authority for invalidating the South Carolina statute, but the contention was given short shrift. The Court stated (336 U. S. at 225):

> This rationale did not find expression in Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, on which respondents rely. According to the majority in Liggett, "a state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" 278 U. S. at 113. But a pronounced shift of emphasis since the Liggett Case has deprived the words "unreasonable" and "arbitrary" of the content for which respondents contend. See Lincoln Federal Labor Union v. Northwestern Iron & Metal Co. 335 U. S. 525, where the cases are reviewed.

It is unnecessary here to restate the review of the cases set forth in the *Lincoln Federal Labor Union* decision, *supra*, at 534-537. It is sufficient to state that the development has been such as to give real meaning to the doctrine of judicial abstention, and to make the words that the court below repeated in that regard become more than empty formulas and really mean what they say. As the Court in the *Lincoln Federal Labor Union* case stated, "the due process clause is no longer to be so broadly construed that the Congress and State legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." 335 U. S. at 536-537. See also the concurring opinion of Mr. Justice Frankfurter, 335 U. S. at 542-557; *Railway Express Agency* v. *New York*, 336 U. S. 106. We think it is clear that if the court below had approached this case with the judicial attitude to which legislation of this character is entitled, and had not lifted statutory provisions from their statutory context in order to find them invalid, and had actually applied to the statutory provisions in this case the principles

of law which it espoused and, finally, had not decided this case from the point of view of a 1928 decision, the soundness of which has since been questioned by this Court, the provisions of the Oklahoma act here in controversy would have been held to offend no provision of the federal constitution.

I

The Challenged Portions of Section 2 of the Oklahoma Act Do Not Offend Any Provision of the Federal Constitution

Due Process—The court below, recognizing that "many aspects of the field of visual care are of sufficient public interest to warrant the operation of police power authority" and that "many regulatory measures directed toward protecting the public in regard to eye care have been judicially sanctioned," (R. 41)[7] conceded that "Clearly that phase of visual care which deals with the actual examination of the eyes (whether for pathology or refraction) together with promotional advertising which brings direct mercantile pressure upon the public to submit to exami-

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[7] The court cited *Roschen* v. *Ward*, 279 U. S. 337; *Commonwealth* v. *S. S. Kresge Company*, 267 Mass. 145, 166 N. E. 558; *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S. E. (2d) 210. There are, of course, many other state court decisions which relate to various aspects of state regulation of the field of visual care. The following decisions are illustrative. *Ritholz* v. *Arkansas State Board*, 206 Ark. 671, 117 S. W. 410; *State* v. *Kindy Optical Co.*, 216 Iowa 1157, 248 N. W. 332; *State ex rel. Beck* v. *Goldman Jewelry Co.*, 142 Kan. 881, 51 P. (2d) 995; *State* v. *Rones*, 223 La. 839, 67 So. (2d) 99; *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N. E. (2d) 378; *Kindy Opticians, Inc.* v. *Michigan State Board of Examiners*, 291 Mich. 152, 289 N. W. 112; *Seifert* v. *Buhl Optical Co.*, 276 Mich. 692, 268 N. W. 784; *State* v. *Goodman*, 206 Minn. 203, 288 N. W. 157; *Sears Roebuck & Co.* v. *State Board of Optometry*, 213 Miss. 710, 57 So. (2d) 726; *N.J. State Board of Optometrists* v. *S. S. Kresge Co.*, 113 N. J. L. 287, 174 A. 353; *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 56 N. E. (2d) 185; *Rowe* v. *Standard Drug Co.*, 132 Ohio St. 629, 9 N. E. (2d) 609; *Neill* v. *Gimbel Bros., Inc.*, 330 Pa. 213, 199 A. 178; *State ex rel. Loser* v. *National Optical Stores Co.*, 189 Tenn. 433, 225 S. W. (2d) 263; see also *Palmer* v. *Smith*, 229 N. C. 612, 51 S. E. (2d) 8.

nations and to purchase spectacles, is subject to legislative control." R. 43.

The court, nevertheless, held invalid the first portion of section 2 of the Oklahoma Act, prohibiting, except upon written prescription of a qualified Oklahoma eye examiner, the fitting, adjusting, adapting, or applying of lenses, frames, etc. to the face of a person, on the sole ground that that portion had the effect of making it unlawful for either a dispensing or laboratory optician, without a prescription, to take old lenses and place them in new frames and then fit the completed spectacles to the face of the eyeglass wearer, thereby preventing eyeglass wearers from exchanging their frames for more modern ones without first visiting an ophthalmologist or optometrist, and also, in the court's view, diverting profitable business from opticians. Since many written prescriptions usually contain no directive data in regard to the fitting of spectacles to the face, the court was satisfied "that the mere fitting of frames to the face, where the old lenses are available, is in reality only an incident to what fundamentally is a merchandising transaction, that is, the sale of a pair of frames; and, in any event, the knowledge necessary to perform these services is strictly artisan in character and can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist". R. 45. These services, in the court's view, bear "no real or rational relation to the actual vision of the public." They do not affect *prospective* eyeglass wearers "inasmuch as a person seeking this particular service must already possess a pair of eyeglasses," and *present* wearers of eyeglasses are not imperiled inasmuch as "such wearers have previously submitted to examinations by professional men at the time the original pairs of spectacles were obtained." The legislature could not, therefore, under the guise that such control is reasonably or rationally related to the health and welfare of

the people, "control these specific functions, and in effect deprive opticians of their right to pursue a lawful calling." R. 46-47.[8]

For substantially the same reasons, the court struck down the second portion of section 2 of the Oklahoma Act prohibiting the duplication of existing lenses or other optical appliances without a prescription from a licensed optometrist or ophthalmologist. The court pointed out that by use of a lensometer, a qualified optician, without the aid of a written prescription, can accurately duplicate an original pair of glasses, a process which it felt was strictly artisan and mechanical, requiring no professional skill. This being so, the court was of the opinion that it was "absolutely unnecessary to delegate to professional men the control of and responsibility for the just-mentioned artisan tasks, where the opticians, as a group, possess adequate skill to fully protect the vision of the public in accurately duplicating existing lenses" (R. 48), and concluded that the requirement of a prescription for duplication of lenses bore no real and substantial relation to the end sought, which was better vision, and was, consequently, unconstitutional.

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[8] It appears from the foregoing that the court's holding of invalidity was limited to the one situation where an *existing* eyeglass wearer who seeks to change his frames cannot do so without a prescription. But the court completely disregarded the much more important application of the provision restricting the fitting, adapting, adjusting or applying of lenses, frames, prisms, etc., without a prescription, to the face of a person who does not already wear eyeglasses. This, in effect, prevents the illegal practice of optometry. Yet the court did not even seem to appreciate that this is what the provision did primarily. And although the court stated nothing in its opinion that even suggests the invalidity of this provision in this latter application, it nevertheless struck it down without any limitation or qualification. (R. 27-28). It seems to us that if the court had been aware of the wide range of undoubtedly constitutional application of the provision, it would not have picked out the one particular application of the statute which it thought transgressed constitutional limitations and then held it invalid without any qualifications of any kind.

This holding of the court below with respect to section 2 is clearly unsound. The provisions of section 2 of the Oklahoma Act are part of a comprehensive legislative scheme designed to carry out the public policy of Oklahoma that the citizens of Oklahoma "shall receive the best possible visual care" and that "no unqualified person shall be permitted to visually correct for compensation the eyes of another." (Sec. 1 of the Oklahoma Act). The provisions of section 2 are directly related to the accomplishment of those legitimate purposes, and the state was acting within its constitutional authority when it included them in its legislation.

Just as a state, under its police power, may regulate the practice of dentistry (*Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608; *Graves* v. *Minnesota*, 272 U. S. 425; *Douglas* v. *Noble*, 261 U. S. 165; *Dr. Bloom Dentist, Inc.* v. *Cruise*, 259 N.Y. 358, 182 N.E. 16, appeal dismissed, 283 U. S. 588; *State Board of Dental Examiners* v. *Miller*, 90 Colo. 193, 8 P. (2d) 699, appeal dismissed 287 U.S. 563) and the practice of medicine (*Watson* v. *Maryland*, 218 U.S. 173; *Dent* v. *West Virginia*, 129 U.S. 114; see *Hayman* v. *Galveston*, 273 U.S. 414; *Crane* v. *Johnson*, 242 U. S. 339) so too, may a state under its police power regulate the field of visual care. *Roschen* v. *Ward*, 279 U. S. 337, affirming *Roschen* v. *Ottinger*, 29 F. (2d) 762 (S.D.N.Y.); *McNaughton* v. *Johnson*, 242 U. S. 344; *Ritholz* v. *Indiana State Board*, 45 F. Supp. 423 (N.D. Ind.); *Klein* v. *Dept. of Registration and Education*, 412 Ill. 75, 105 N.E. (2d) 758, cert. den. 344 U. S. 855. While it is unnecessary here to set out in detail all the variety of legitimate state regulations in this field, it should be noted generally that a state, among other things, may establish qualifications for the practice of optometry and limit the practice to those having licenses therefor. *McNaughton* v. *Johnson*, 242 U. S. 344; *Klein* v. *Dept of Registration and Education*, 412 Ill. 75, 105 N.E. (2d) 758, cert den. 344 U. S. 855; *Sears Roebuck Co.*

v. *State Board of Optometry*, 213 Miss. 710, 57 So. (2d) 726. It can prevent corporations from practicing optometry and performing optometric services (*State* v. *Kindy Optical Co.*, 216 Iowa 1157, 248 N.W. 332; *State ex rel Beck* v. *Goldman Jewlry Co.*, 142 Kan. 881, 51 P. (2d) 995; *Rowe* v. *Standard Drug Co.*, 132 Ohio St. 629, 9 N.E. (2d) 609; *Neill* v. *Gimbel Bros., Inc.*, 330 Pa. 213, 199 A. 178; *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S.E. (2d) 210); it can prevent laymen from employing licensed optometrists to perform such services (*Ritholz* v. *Arkansas State Board*, 206 Ark. 671, 117 S.W. 410); it can regulate the advertising of such services and of the sale of eyeglasses (*State* v. *Rones*, 223 La. 839, 67 So. (2d) 99; *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N.E. (2d) 378; *Seifert* v. *Buhl Optical Co.*, 276 Mich. 692, 268 N.W. 784; *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 56 N.E. (2d) 185; *Ritholz* v. *Commonwealth*, *supra*); and it can limit the sale of eyeglasses so that only certain qualified and licensed persons may be in charge of the sale. *Roschen* v. *Ward*, 279 U.S. 337; *Commonwealth* v. *S. S. Kresge Co.*, 267 Mass. 145, 166 N.E. 558; *City of Springfield* v. *Hurst*, *supra*. See also *N. J. State Board of Optometrists* v. *S. S. Kresge Co.*, 113 N.J.L. 287, 174 A. 353. *Abelson's Inc.* v. *N. J. State Board of Optometrists*, 5 N.J. 412, 75 Atl.(2d) 867.

The court below apparently did not dispute the soundness of any of the foregoing principles or decisions. Instead, as we have stated, it found none of them applicable and held the provisions of section 2 of the Oklahoma Act here involved to be beyond the police power of the state because, in the court's view, they in effect regulated an artisan and commercial, rather than a professional, service which could be performed by an artisan—the optician—equally as well as by a professional, with the consequence that they bore no reasonable relation to the public health and welfare.

It would seem, in our view, that such a conclusion was foreclosed by this Court's decision in the leading case of

Roschen v. *Ward*, 279 U. S. 337, a decision which the court below referred to only incidentally in passing in a footnote. R. 41, n. 8. The *Roschen* decision upheld the validity of a statute of the State of New York which made it unlawful to sell at retail in any store or established place of business "any spectacles, eyeglasses, or lenses for the correction of vision" unless a duly licensed physician or optometrist was in charge of and in personal attendance at the place in the store where the glasses were offered for sale. The complainants in *Roschen* were selling only ordinary store spectacles with convex-spherical lenses which merely magnify and which, it was contended, could do no harm. The customers selected the glasses by themselves without examination and paid relatively small sums for them. It was also contended that the cost of employing a licensed optometrist or physician would make the business impossible and that, further, the statutory requirement was unreasonable in the common case of eyes only grown weaker because of age. These contentions were given short shrift, as was the contention that the statute did not require the optometrist actually to make an eye examination. Mr. Justice Holmes stated (279 U. S. at 339-340):

> When the statute requires a physician or optometrist to be in charge of the place of sale and in personal attendance at it, obviously it means in charge of it by reason of, and in the exercise of, his professional capacity. If we assume that an examination of the eye is not required in every case, it plainly is the duty of the specialist to make up his mind whether one is necessary, and, if he thinks it necessary, to make it. * * * Moreover, as pointed out below, wherever the requirements of the act stop, there can be no doubt that the presence and superintendence of the specialist tend to diminish an evil. A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce.

> Of course we cannot suppose the act to have been passed for sinister motives. We will assume that there are strong reasons against interference with the business as now done; but it is obvious that much good would be accomplished if eyes were examined in a great many cases where hitherto they have not been, and the balancing of the considerations of advantage and disadvantage is for the legislature, not for the courts. We cannot say, as the complainants would have us say, that the supposed benefits are a cloak for establishing a monopoly and a pretense.[9]

The business of selling plain store glasses, which was foreclosed in the *Roschen* case unless the sale was in charge of a registered optometrist or physician, is certainly no

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[9] In the District Court in the *Roschen* case, Judge Augustus N. Hand stated: "To render an optometrist available wherever eyeglasses are sold is certainly a long step toward correcting existing evils. * * * It seems to us that the inevitable tendency would be for customers to consult him, and for a reputable optometrist to furnish assistance and advice as to their needs. If the effect of the new requirement should finally be to render the sale of a standardized product unprofitable, so that the customers in the end would not purchase it, but would have their eyes carefully tested and their glasses made according to special prescriptions, it cannot be said the result might not on the whole be desirable. At any rate, whatever the result to the business of selling a standardized product, the correction of certain manifest evils was within the legislative power, and the means adopted seems to have been reasonably calculated to promote the public health and safety. * * *

"The New York Legislature was not obliged, if it legislated at all, to require an examination of the customer by a licensed optometrist before permitting a sale of eyeglasses to him. Doubtless it could have done this. But it might adopt a halfway measure, safeguarding him by in effect placing sales in charge of a man of scientific training, and rendering the services of the latter naturally available. This it did, and this was, we think, constitutional." 29 F. (2d) 762, 764.

In regard to the possible application of the statute to sales of eyeglasses other than mere magnifying glasses, Judge Hand observed: "Moreover, the complaints do not show that a supervision of sales of spectacles by optometrists, who can more accurately fit a customer than he can fit himself, and who will be in a position to inform him as to eye troubles which cannot be remedied by magnifying glasses, is not a step in the public interest." *Id.* at 765.

less a mercantile transaction and no more a professional service rationally related to the public health and welfare than the services here sought to be foreclosed by the State of Oklahoma, which involve the actual fitting, adapting, and adjusting of lenses, frames and other optical appliances to the face of a person and the duplication of prescription lenses specially made to correct the errors in vision of a particular person. Indeed, the validity of section 2 of the Oklahoma Act follows, *a fortiori*, from the decision of this Court in the *Roschen* case (see *Commonwealth* v. *Ferris*, 305 Mass. 233, 237, 25 N. E. (2d) 378, 381; *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 54, 56 N. E. (2d) 185, 187), and why the *Roschen* case was not held to be controlling here is absolutely beyond comprehension.

As a matter of fact, the court's opinion itself would seem to require such a holding, and its failure to so hold would seem to constitute a disregard for the authority of decisions of this Court. As we have already pointed out, the court was not unaware of the *Roschen* decision, having cited it for the proposition that "many regulatory measures toward protecting the public in regard to eye care have been judicially sanctioned." R. 41, n. 8. Nowhere in its opinion did the court attempt to distinguish *Roschen;* instead it pointed out that the situations sought to be regulated by section 2 of the Oklahoma Act and the legislation in the *Roschen* case were identical insofar as their relationship to the public health and welfare was concerned. As we have already noted, the court held section 2 invalid, not only on the ground that it violated the due process clause, but also because it violated the equal protection clause of the Fourteenth Amendment (a matter which we will discuss more fully hereinafter). The court based its holding on the equal protection issue on the fact that the act exempted sellers of ready-to-wear glasses from control. This was the class covered by the *Roschen* case. In order to find a denial of equal protec-

tion, the court pointed out (R. 51) that sellers of ready-to-wear glasses "from the viewpoint of public health and welfare, lie within the identical class and circumstance occupied by 'fitters and sellers of frames' and 'duplicators of lenses and entire spectacles.'" The court continued (R. 52):

> * * * Persons who sell frames (incidentally adapting and fitting the completed spectacles to the face), persons who duplicate original eyeglasses and market the dulplicated spectacles, and persons who sell ready-to-wear glasses are identically situated; that is, all are sellers of merchandise which is not immediately connected with or supervised by a professional eye examiner. Yet the public health and welfare is touched in the same manner and degree by each of these groups inasmuch as the possible result is exactly the same; people may wear spectacles which are not best suited for their eyes.

Having so concluded, the court should have sustained the validity of section 2 under the due process clause on the authority of the *Roschen* case, without more. Its failure to so hold, as we have already indicated, seems incomprehensible. It could be that the court, when it considered the equal protection issue, forgot that this Court had decided the *Roschen* case, and did not realize, therefore, that its own holding in this case on the due process issue was in direct conflict with the *Roschen* decision.

Moreover, and quite apart from the authority of this Court's decision in *Roschen*, the court below erred on principle when it concluded that the regulatory features of section 2 of the Oklahoma Act here under consideration bore no rational relation to the public health and welfare of the people of the State of Oklahoma.

We submit that all of the factors which apparently led the court below to its conclusion are irrelevant and beside the point. It is entirely immaterial that the fitting of frames or the duplicating of lenses may be considered artisan tasks which a qualified optician can perform satis-

factorily. It is also immaterial that licensed optometrists and ophthalmologists often use the lensometer for duplication of lenses just as an optician does. Further, it is entirely immaterial that prescriptions of optometrists and ophthalmologists often do not contain any directive data in regard to the manner in which the spectacles are to be fitted to the face of the wearer. The real question in this case is not whether the optician can do these tasks. Although the record shows (R. 99, 106, 107, 138-139, 142, 235, 236-237, 250-251, 258) that, in fact, a pair of eyeglasses can be more accurately duplicated from a prescription than by the use of a lensometer and that in some instances a prescription is absolutely essential, the really important consideration is whether a particular pair of glasses is the proper pair for a particular individual to wear in order to correct the particular defects in his vision or to alleviate some eye condition or eye ailment that he may have. This judgment an optician is not qualified to make, no matter how expert a mechanic or technician he may be. Only a prescription from a licensed professional optometrist or ophthalmologist can tell him that a particular pair of glasses is suitable for a particular individual. Even if it is conceded that an optician is qualified to take old lenses, place them in new frames, and then fit the completed glasses to the face of the wearer, the optician does not and cannot know whether the lenses are appropriate for the wearer. And the same is true, of course, in the matter of duplication of existing lenses. Even if it is conceded that a qualified optician can duplicate an existing lens, there is no contention that he is qualified to determine whether the lens is appropriate for the particular wearer. Only the optometrist or ophthalmologist, whose prescription the statute requires, can determine that. The court's suggestion (R. 46) that by striking down the statutory requirement "*present* wearers of eyeglasses are not imperiled inasmuch as such wearers have previously submitted to examinations by professional

men at the time the original pairs of spectacles were obtained" is plainly not sound and overlooks the very real protection the requirements of the statute afford. In the first place, when a customer comes to an optician with lenses to be inserted in new frames or to be duplicated, the optician does not know, as the court below assumed, whether the customer had in fact submitted to a professional examination by a qualified eye examiner, or whether the glasses had been made in violation of the law. He does not even know whether the glasses actually belong to the customer or whether they were originally made for him. But more important still, even if the glasses had originally been made for the particular customer in accordance with a proper prescription, the optician has no information and, indeed, no qualifications, with respect to the vitally important questions whether those glasses are the proper glasses for the person to be wearing at that time or for some time in the future, or whether any glasses at all are now necessary. It is no answer to suggest that the optician can inquire how long ago the glasses were made or when the person last had his eyes examined, and, where he thinks it appropriate, refer the person to some qualified professional eye examiner. These are professional judgments, not to be made by the unqualified optician. The salutary effect of the Oklahoma statute is to provide that such judgments be made by qualified professional men, a requirement that the State of Oklahoma is certainly free to make. See *Roschen* v. *Ward*, 279 U. S. at 339; *Commonwealth* v. *S. S. Kresge Co.*, 267 Mass. 145, 166 N.E. 558; *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N. E. (2d) 378; *Klein* v. *Dept. of Registration and Education*, 412 Ill. 75, 105 N. E. (2d) 758, cert. den. 344 U. S. 855; cf. *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P. (2d) 427; *Curtis* v. *State*, 78 Okla. Cr. 282, 142 P. (2d) 465. In the *Klein* case, *supra*, the Supreme Court of Illinois, in upholding the validity of a requirement that records of all prescriptions be preserved

for at least three years, recognized the desirability of periodic eye examinations stating (412 Ill. 75, 81, 105 N.E. (2d) 758, 762):

> It is common knowledge that the eye continues to vary from normal even when spectacles are worn and that in some instances the spectacles may have the corrective effect of causing the eye to return to normal. In either case, periodic examinations result and reference to previous treatment and prescription would insure more comprehensive and intelligent treatment.

While the provisions of section 2 here under consideration do not require periodic eye examinations, they do make the purchase of new frames or the duplication of old lenses the occasion for a professional eye examination by a licensed optometrist or ophthalmologist. This would seem to be a most reasonable requirement. The purchase of a new pair of frames or the duplication of old lenses involves the expenditure of money, and such cost naturally tends to make a person try to get along for some time with the glasses for which he has incurred the expense. If there were no eye examination at that time, the expenditure would have the effect of delaying or eliminating an eye examination that would normally be sought otherwise. The Oklahoma legislation prevents just that. And since its effect is to make persons seeking new frames or duplicate lenses "have their eyes carefully tested and their glasses made according to special prescriptions, it cannot be said that the result on the whole might not be desirable." *Roschen* v. *Ottinger*, 29 F. (2d) 762, 764 (S.D.N.Y.).

It is true that where an optician already has a customer's prescription on file, he is authorized by the statute to perform the services with which we are dealing,[10] with the result that the customer whose prescription is on file would not be required to have a new examination by a registered optometrist or ophthalmologist. Plaintiffs, of

[10] Section 2 also provides that the optician "may continue to do said acts on the aforesaid written prescription or its duplicate."

course, cannot complain of this, and furthermore, "a statute is not invalid under the Constitution because it might have gone farther than it did," (*Roschen* v. *Ward*, 279 U. S. at 339) and in all cases actually require a new eye examination by a professional eye examiner. Nor can plaintiffs complain that the effect of the legislation is to cause expense, in some cases, to citizens of Oklahoma who might be required to consult an optometrist or ophthalmologist for an eye examination. Furthermore such a contention is without merit. As Judge A. N. Hand stated in the *Ottinger* case, *supra*, with respect to a similar suggestion concerning the expense of professional eye care (29 F. (2d) at 763):

> In respect to the first contention, it might equally have been made as an objection to requiring a license to practice medicine. There are some remote localities even now that might be better off if persons having some experience in nursing were allowed to practice medicine than to be compelled in many cases to do without medical treatment because physicians are unavailable. Yet the Legislature has regarded the temptation to use makes shift remedies and employ quacks as so strong, and the results in general as so bad, that it has rigorously prohibited the practice of medicine except by licensed physicians. The same is true of law practice, and the hardship of being compelled to employ men educated at large expense, where in some cases self-taught practitioners, who have never been admitted to the bar, might have answered the purpose as well, is no answer to the requirement.

The court below was mistaken when it asserted that section 2 of the Oklahoma Act had the effect of "arbitrarily legislating many of the skilled artisans out of a long recognized trade" and that the "action by the legislature in the instant act is as unreasonable as if pharmacists were divested of their right to do business by legislative action which delegated to physicians the absolute control and responsibility for accurate *compounding* of medical prescriptions for the reason that a physician alone is qualified to

prescribe drugs for patients." (R. 49-50). The Act does not in any sense legislate opticians out of business; nor does it transfer opticians' business elsewhere.[11] Opticians are still free to ply their trade and to dispense their services. What the Act does is to make sure that the optician's services are dispensed in the public interest. This it does by requiring a prescription from a qualified professional eye examiner before the services here involved are dispensed, and an optician is not a professional eye examiner. This limitation is no different than existing limitations on pharmacists who cannot dispense certain drugs without a physician's prescription. The optician's business is not taken in any sense (cf. *Breard* v. *Alexandria*, 341 U. S. 622, 632-633); only the manner in which it may be carried on is regulated in the public interest in order to protect the public from the evils which would result in the absence of such salutary restrictions—evils, incidentally, of which the court below was aware when it stated (R. 44):

> Unquestionably, the general health and welfare could suffer as a result of promiscuous and indiscriminate fittings of eyeglasses by persons unqualified to examine the eyes, particularly where the examiners were not qualified to recognize, even if not treat, various diseases of the eye. * * *[12]

[11] Section 2 provides that "the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person." The court below stated that the effect of this provision "is to place within the exclusive control of optometrists and ophthalmologists the power to choose just what individual opticians will be permitted to pursue their calling" (R. 49, n. 20). In the first place, optometrists do not refer their patients to opticians, and in the second place, there is nothing in the record to suggest that reputable ophthalmologists do not hold themselves responsible in the absence of statutory provisions such as this, or that some or most ophthalmologists do not ordinarily direct their patients to particular opticians in whose qualifications they have confidence. Finally, there is no constitutional right in any individual optician to be free of the competition of better qualified opticians.

[12] In an effort to show the damaging effect of section 2 on the opticians' business the court below stated (R. 45, n. 16): "As

The effort of the court below (R. 46-47) to minimize the importance of accurate eye examination in order to show that the services here involved are not reasonably related to the public health and welfare is, indeed, surprising, but, in any event, it proves too much. If it is of no importance that glasses are improperly fitted because "the doctor was a little careless that morning," so long as the patient has no discomfort, and if it is of no importance that lenses be on the proper axis, or that persons not wear the "screwiest type of glasses," (R. 46) then there is no real basis for any legislation at all in the field of visual care. The fact is, however, as the record shows (R. 44, 99, 104, 106, 108-109, 241-242, 388) that improperly fitted glasses result in headaches, nervousness and loss of efficiency, and these are evils which the State can protect its citizens against.

One would gather from the reading the opinion of the court below that the State of Oklahoma was alone in enacting legislation such as the provisions of section 2 here under consideration. But that is by no means the case. The reasonableness of the Oklahoma legislation is evidenced by the fact that many other states have thought it to be of sufficient importance to the public health and welfare of their citizens to enact similar legislation. Yet three federal judges assert that all those state legislatures were

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demonstrated by the evidence the dispensing optician has two things to sell; lenses and frames. If prospective purchasers of frames are required to go to an ophthalmologist or optometrist to get an ophthalmic prescription, inasmuch as the optometrist fills all of his own (and actually sells between 60-70% of the eyeglasses sold) the inevitable effect will be to deprive the optician of a sizeable amount of trade." But the court's conclusion does not follow. Concededly, a person must go to either an optometrist or an ophthalmologist for a prescription for his original pair of eyeglasses, and there is nothing in the record to suggest that a person who had originally used the services of an optometrist would not return there for a new frame or a duplicated lense, even if no prescription were necessary, rather than go to a new optician. And since the ophthalmologist does not *fill* prescriptions, the optician can point to no loss of business from those who return to ophthalmologists for prescriptions. Indeed any legitimate business that the opticians might lose as a result of the requirements of section 2 is purely hypothetical.

acting without any rational basis. Seventeen other states have enacted legislation which specifically prohibits the duplication of ophthalmic lenses without a prescription from a licensed optometrist or ophthalmologist.[13] And twelve other states include in their definition of the profession of optometry the adapting, fitting, adjusting, applying or employment of frames, mountings or other optical appliances to correct errors of vision, and provide that this cannot be done by one not a licensed optometrist, except on prescription.[14] All this legislation would fall if the decision of the court below were affirmed as to section 2.[15]

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[13] Arkansas Stats. Annot. (1947) sec. 72-801; Deering's California Codes (Business and Professions) Supp. 1949, sec. 3042; Idaho Code Annot. (1948), sec. 54-1517; Burns Indiana Stats Annot. (1951) 63-1019(e); Iowa Code Annot. (1949) sec. 154.9; Louisiana Rev. Stats. (1950) sec. 1065; Rev. Stats. of Maine (1944) c. 69, secs. 6 (IV), 7; Rev. Codes of Montana (1947) sec. 66-1302(9); Nevada Compiled Laws (Supp. 1943-1949) sec. 4966(e); New Mexico Stats. Annot. (1941) 51-702, 51-703, 51-713 (j); General Statutes of North Carolina, sec. 90-115; Oregon Compiled Laws Annot. (1940) 54-722; Williams Tennessee Code Annot. (1934) sec. 7027(1), 7028; Utah Code Annot. (1953) 58-16-11(4); Code of Virginia (1950) sec. 54-396(10); West Virginia Code of 1943, sec. 2931(d) 2933; Wyoming Compiled Stats. (1945) sec. 37-1802.

[14] Deering's California Codes (Business and Professions) Supp. 1949 (sec. 3041); Colorado Stats. Annot. (1935) c. 120, sec. 1; Florida Stats. Annot. (1952) sec. 463.01; Idaho Code Annot. (1948) sec. 54-1501; Louisiana Rev. Stats. (1950) sec. 1041(3); Rev. Stats. of Maine (1944) c. 69, sec. 6(III); Page's Ohio General Code Annot. sec. 1295-21, 1295-22; Oregon Compiled Laws Annot., 54-701; Supp. to South Dakota Code of 1939, sec. 27.0701; Williams Tennessee Code Annot. (1934) sec. 7027(1); Utah Code Annot. (1953) 58-16-11(4); Remington's Rev. Stats. of Washington Annot., sec. 10147.

[15] In addition, the statutes of substantially all of the states define the practice of optometry to include the adapting of lenses or prisms for the aid of human vision, and make it unlawful for one to practice optometry without a license. The decision of the court below, insofar as it permits the adapting of frames to one's face by an unprofessional person without a prescription, appears to constitute judicial sanction to violate all of these statutes, the validity of which the court does not seem to doubt, because a frame is not adapted to one's face without lenses in them.

We think it is clear, on both principle and authority, that the provisions of section 2 of the Oklahoma Act here under consideration do not offend the provisions of the due process clause of the Fourteenth Amendment.

Equal Protection—As we have already pointed out, the court below also held section 2 invalid on the additional ground that it violated the equal protection clause of the Fourteenth Amendment. The denial of equal protection was found in "the fact that section 3 exempts from regulation all sellers of ready-to-wear glasses, even though such sellers, from the viewpoint of public health and welfare, lie within the identical class and circumstance occupied by 'fitters and sellers of frames' and 'duplicators of lenses and entire spectacles.'" (R. 51) This holding of the court below is plainly unsound. *American Federation of Labor* v. *American Sash & Door Co.*, 335 U. S. 538; *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608; *Hayman* v. *Galveston*, 273 U. S. 414, *McNaughton* v. *Johnson*, 242 U. S. 344; *Watson* v. *Maryland*, 218 U. S. 173.

It is well settled that a State is not bound "to strike at all evils at the same time or in the same way" (*Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 610) and that "the existence of evils against which the law should afford protection and the relative need of different groups for that protection 'is a matter for the legislative judgment.'" *American Federation of Labor* v. *American Sash & Door Co.*, 335, U. S. at 542. In the instant case the legislature of Oklahoma provided that nothing in the Oklahoma Act should "prohibit the sale of ready-to-wear glasses equipped with convex spherical lenses * * * when sold as merchandise at any established place of business and where the selection of the glasses is at the discretion of the purchaser." This was a judgment that the Oklahoma legislature was entitled to make, and the reasonableness of this judgment is evidenced by the

fact that thirty-nine states and the District of Columbia specifically exempt the sale of ready-to-wear glasses from their visual care legislation.[16] And all but one of the states which make it unlawful to duplicate lenses without a prescription specifically exempt the sale of ready-to-wear eyeglasses from their legislation.[17] In addition, all but one of the states which include the adapting, fitting, or adjusting of frames, mountings or other optical appliances within the definition of optometry specifically exclude the sale of ready-to-wear glasses from their legislation.[18]

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[16] Code of Alabama (1940) Title 46, sec. 209; Arizona Code Annot. (1939) sec. 67-1407; Arkansas Stats. Annot. (1947) sec. 72-819; Deering's California Codes (Business and Professions) (1944) sec. 3043; Colorado Stats. Annot. (1935) c. 120, sec. 19; Delaware Code Annot. (1953), Title 24, sec. 2117; D. C. Code Annot. (1951) sec. 2-520; Florida Stats. Annot. (1952) sec. 463.16; Code of Georgia Annot. (1937) sec. 84-1108; Idaho Code Annot. (1948) sec. 54-1515; Jones Illinois Stats. Annot. (1953 Cum. Supp.) sec. 94.20; Iowa Code Annot. (1949) sec. 154.2; Kentucky Rev. Stats. (1953) sec. 320.010(4) Louisiana Rev. Stats. (1950) sec. 1065; Rev. Stats. of Maine (1944) c. 69, sec. 7; Annot. Code of Maryland (Flack, 1951) Art. 43, sec. 362; Annot. Laws of Mass. (1949) c. 112, sec. 73; Michigan Stats. Annot. (1937) c. 123, sec. 14.647(d); Mississippi Code Annot. (1942) sec. 8846; Vernon's Annot. Missouri Stats. (1952) sec. 336.120(3); Rev. Codes of Montana (1947) sec. 66-1316; Rev. Stats. of Nebraska (1943) sec. 71-1,134; Nevada Compiled Laws (1929) sec. 4980; Rev. Laws of New Hampshire (1942) c. 253, sec. 13; New Mexico Stats. Annot. (1941) 51-714; General Stats. of North Carolina, sec. 90-124; North Dakota Rev. Code of 1943 (Supp. 1953) 43-1302; Page's Ohio General Code, sec. 1[illegible]34; Oregon Compiled Laws Annot. (1940) 54-702; Purdon's Penna. Stat. Annot., title 63, sec. 240; Code of Laws of South Carolina (1952) sec. 56-1083; Williams Tennessee Code Annot. (1944) 7028; Vernon's Texas Civil Stats, Articles 4552, 4565 d, 4566; Utah Code Annot. (1953) 58-16-13(3); Vermont Stats. (1947 Revision) sec. 6883; Code of Virginia (1950) sec. 54-369; Remington's Rev. Stats. of Washington (Supp. 1940) sec. 10159; West Virginia Code of 1943, sec. 2933(d); Wisconsin Stats. (1953) c. 153, sec. 153.02(2); Wyoming Compiled Stats. (1945) sec. 37-1802.

[17] See fn. 13, *supra*. The legislation of Indiana contains no specific exemption for the sale of ready-to-wear glasses.

[18] See fn. 14 *supra*. Only the South Dakota legislation contains no specific exemption.

Contrary to what the court below said, there is in fact a basis for the exercise of the judgment of the Legislature of Oklahoma on this subject. The American Optometric Association does not approve the sale of ready-made glasses (which only magnify) over store counters nor does it approve of self-prescription. There are distinct differences between ready-made eyeglasses and the eyeglasses which are prepared and dispensed pursuant to prescription. In the case of the ready-made glasses, the patient prescribes for himself. In the second case, he has deliberately gone to an ophthalmologist or an optometrist for a "custom made" prescription to fit and alleviate and correct the conditions of his own particular vision. Furthermore, the lenses in ready-made glasses are always restricted to mere magnifying lenses, whereas the lenses in eyeglasses which have been prescribed by an ophthalmologist or an optometrist can and do range the entire gamut of powers.

The court below was mistaken in holding that the sale of ready-made glasses is the same as the sale of glasses dispensed pursuant to examination. The Oklahoma Legislature had the perfect right to concede that the sale of ready-made glasses constituted less of an evil than the sale of glasses of any power without prescription. The Legislature could attack both evils or either. They are certainly not the same evils even though the result in each case might be an impairment of visual efficiency and comfort. The choice of which evil should be regulated rests with the Legislature and not with the court.

The indiscriminate use of ready-to-wear magnifying glasses has a relationship to the public health and welfare which should be regulated, as in the State of New York (see *Roschen* v. *Ward*, 279 U. S. 337). The seeing ease and comfort which ready-to-wear glasses provide in many cases may hide serious eye ailments and consequently delay their discovery, detection and treatment. Although we believe that the sale of ready-to-wear glasses should

not be left uncontrolled to be governed by the standards of the market place, we can understand clearly the basis of the legislative judgments in the great majority of the states exempting such sales from regulation. As we have pointed out several times, the State of New York does not permit such sales unless a duly registered optometrist is in charge of the booth where the sale is made. On the other hand, the New York statute specifically provides that "duplications, replacements, reproductions or repetitions may be made without prescription." (16 McKinney's Consol. Laws of N. Y., sec. 7120; see also sec. 7109). Under the decision of the court below, this exemption in the New York statute renders invalid the New York regulation of the sale of ready-to-wear glasses on the grounds of a denial of equal protection, and the *Roschen* case was, therefore, wrongly decided by this Court. The fact is that these are choices to be made by the State legislatures as matters of policy. "Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and elements of conflicting values are largely imponderable. Assessing of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution." Mr. Justice Frankfurter, concurring in *American Federation of Labor* v. *American Sash & Door Co., Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co., and Whitaker* v. *North Carolina*, 335 U. S. 542, 557.[19]

[19] The suggestion in the court below that the Oklahoma Act was sponsored by the optometrists as a group is immaterial. *Breard* v. *Alexandria*, 341 U. S. 622, 636, n. 20; *Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, 224; *Roschen* v. *Ward*, 279 U. S. 337, 340.

II

The Challenged Portions of Section 3 of the Oklahoma Act Do Not Offend any Provision of the Federal Constitution

The provisions of Section 3 of the Oklahoma Act which are here involved are those which make it unlawful "for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms or any other optical appliances or devices * * * by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement."[20]

It is the position of the American Optometric Association that these provisions are in all respects valid under the Constitution of the United States.

Due Process—The advertising restrictions of Section 3 apply to licensed optometrists and to any ophthalmologists who offer for sale any of the optical devices mentioned therein. Section 3 is, therefore, in part, a regulation of the conduct of professional people.[21] The restrictions in section 3 apply also to opticians and to any one else who offers for sale the optical devices mentioned in the section. But the inclusion within the scope of section 3 of these non-professional classes who would prefer to sell eye glasses,

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[20] The court below limited its holding of unconstitutionality to "frames, mountings, * * * or any other appliances," and while the court stated generally that its specific holdings of invalidity were made "without impliedly sanctioning all other provisions of this Act" (R. 44), it seems clear from the portion of the opinion dealing specifically with section 3 that it upheld the advertising restrictions in section 3 relating to the other articles mentioned. Judge Murrah, in his dissent (R. 64) so construed the court's holding, and so do the plaintiffs who challenge the court's holding with respect to "spectacles, eye glasses, lenses * * * (and) prisms" in their appeal in No. 185. Section 3 also forbids the advertising of "eye examinations" and "visual services," but the validity of the restriction as to them is apparently not in issue here.

[21] The court below conceded that the profession of optometry might be regulated in the interests of public health and welfare identically with the "fields of medicine and dentistry." R. 54-55.

etc. in accordance with mercantile practices and without regard to the ethics and standards designed to afford protection to the public health and welfare does not present any independent ground of constitutional invalidity. The practices of these groups were, and had to be, regulated in order that the evils, which the statute was designed to eliminate, might not be accomplished by indirection. See *Roberts Optical Co.* v. *Dept. of Registrations and Education*, No. 33139, S. Ct. of Illinois, decided October 24, 1954; *Lasdon* v. *Hallihan, Director of Registration and Education*, 377 Ill. 187, 36 N. E. (2d) 277; *State* v. *Rones*, 223 La. 839, 67 So. (2d) 99; *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N. E. (2d) 378; *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P. (2d) 427; *Curtis* v. *State*, 78 Okla. Cr. 282, 142 P. (2d) 465.[22] If "it is against the

[22] In the *Lasdon* case, *supra*, involving advertising by a dental laboratory, and not dentists, the Supreme Court of Illinois stated (377 Ill. at 194-195):

"It is obvious that if they (dental laboratories) were permitted to thus advertise their business, the practice of the profession of dentistry would, to a great degree, be subservient to those engaged in the making of the plates. It is well known that masses of the public do not comprehend or understand the skill that is necessary to the making of proper dentures. Such persons are often attracted by the advertisements of the quack and charlatan and seek his services. * * *

"If the advertisement carried on by the dental laboratories was the medium that brought the customer to the laboratory, and he was sent from there to Dr. Hejna's office, it would, as to its effect upon the dental profession, be much the same as though he had come to Dr. Hejna's office in answer to an advertisement of Dr. Hejna's, which is prohibited by sections 18 and 18b of the Act. If the restrictions of which appellants complain were removed, it would permit licensed dentists receiving patients referred to them by the dental laboratories to do indirectly what other provisions of the Act prohibit them from doing directly."

In the *Roberts Optical Co.* case, *supra*, the Supreme Court of Illinois, relying on the *Lasdon* decision, upheld the advertising restrictions of the Illinois Optometric Practice Act, as applied to opticians employing registered optometrists which the Illinois Act permitted. The court stated: "The power of the legislature to regulate advertising practices does not depend upon whether plaintiff's occupation is called a trade or a profession, but upon

best interest of the public to have the number of eyeglasses worn determined by mercantile practices rather than the actual visual need of the people," based on unsolicited professional advice, as the court below states (R. 53-54), then it is the same evil whether the mercantile practices are carried on by licensed optometrists or whether they are carried on by non-professional merchandisers. Legislation, to be effective, necessarily must control the practices of both groups, and it is for this obvious reason that so many of the state statutes which regulate advertising in the field of visual care are all-inclusive in their coverage,[23] applying to all persons, professional and non-professional alike.

In *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, this Court had before it legislation of the State of Oregon which limited advertising by dentists.[24]

whether it is of a character such that commercialized exploitation might endanger the public health. What was said in rejecting a similar contention advanced by operators of dental laboratories who advertised the sale of dentures is applicable here.

[23] Code of Alabama (1940) Title 46, sec. 211; Arkansas Stats. Annot. (1947) sec. 72-815; Deering's California Codes (Business and Professions) secs. 3120, 3130, Colorado Stats. Annot. (1935) c. 120, secs. 21, 22; Florida Stats. Annot. (1953) sec. 463.14; Burns Indiana Stats. Annot. (1951) 63-1019(d), (f); General Stats. of Kansas Annot. (1949) 65-1504(h); Kentucky Rev. Stats. (1953) sec. 320.020(4); Louisiana Rev. Stats. (1950) sec. 1063(9); Annot. Laws of Mass. (1949) c. 112, sec. 73A; Mich. Stats. Annot. (1937) c. 123, sec. 14.648(h); Vernon's Annot. Missouri Stats. (1952) sec. 336.200; Rev. Codes of Montana (1947) sec. 66-1302(11); New Jersey Stats. Annot. (Supp. 1953) 45:12-19; New Mexico Stats. Annot. (1941) 51-713 (k) (l) (m); Code of Laws of South Carolina (1952) sec. 56-1075; Code of Virginia (1950) sec. 54-396 (4), (6), (); Remington's Rev. Stats. of Washington (Annot.) sec. 10152 (10)-(15); Wisconsin Stats. (1953) c. 153, sec. 153.10; Wyoming Compiled Stats. (1945) 37-1807.

[24] In addition to advertising of an untruthful or misleading nature, the legislation prohibited "advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing

In sustaining the validity of the legislation, Mr. Chief Justice Hughes stated (294 U. S. at 612-613):

> The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of the expert opinion as to the necessity of such standards.
>
> It is no answer to say, as regards appellant's claim of right to advertise his "professional superiority" or his "performance of professional services in a superior manner," that he is telling the truth. In framing its policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The legislature was entitled to consider the general effects of these practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement.

The limitations and restrictions on advertising in the field of dentistry are equally applicable and equally valid

as part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly." 294 U. S. at 609.

in the field of visual care,[25] and the highest courts of the states which have considered the problem have so held. In *Klein* v. *Department of Registration and Education*, 412 Ill. 75, 105 N. E. (2d) 758, cert. den. 344 U. S. 855, the Supreme Court of Illinois sustained legislation which prohibited certain kinds of optical display advertising on signs, in windows and telephone directories, and which prohibited displaying spectacles, frames, mountings, glass cases, optical equipment or merchandise in office windows or in display cases that could be seen from the outside. In *State* v. *Romes*, 223 La. 839, 67 So. (2d) 99, the Supreme Court of Louisiana sustained legislation which prohibited the advertising of optometric services for a price and the advertising of the price of lenses, eyeglasses, frames and fittings. In *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N. E. (2d) 378, the Supreme Judicial Court of Massachusetts upheld the validity of legislation prohibiting the advertising of a frame or mounting at a price unless coupled with a statement that the price did not include lenses, eye examination, or professional services. It also prohibited the advertising of lenses, or complete eyeglasses at a price and any statement about underselling competitors. And only recently the Supreme Court of South Dakota upheld the validity of a restriction which completely prohibited optometrists from engaging in any "public advertising by printed matter, radio, window display, road signs, clock signs, hand-bills, posters, circulars, novelties, favors * * *." *Norwood* v. *Parenteau*, S. Ct. S. D. (1954), 63 N. W. (2d) 807. See also *Seifert* v. *Bahl Optical Co.*, 276 Mich. 692, 268 N. W. 784 (no advertising of optometric services at a price); *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 56 N. E. (2d) 185 (no advertising by newspaper, radio display or otherwise of the price of lenses, complete eyeglasses,

[25] "It would seem that the public has as much need to be protected from quacks and charlatans in optometry as in dentistry or any other subdivision of medicine." *State ex rel Sisemore* v. *Standard Optical Co. of Oregon*, 182 Or. 452, 460, 188 P. (2d) 309, 312.

either with or without optometric services, or credit terms, installment payments or price plans); *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S. E. (2d) 210, (no advertising of the sale of eyeglasses, lenses, frames, mountings for a price, no advertising of low prices, free eye examinations, guaranteed work, etc.); cf. *Ritholz* v. *City of Detroit*, 308 Mich. 258, 13 N. W. (2d) 283; *Kindy Opticians, Inc.* v. *Michigan State Board of Examiners*, 291 Mich. 152, 289 N. W. 112. Indeed, the court below, citing *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P. (2d) 427 and the *Semler* decision by this Court, agrees that the legislature has authority to regulate and control advertising "which not only tends to persuade the public to submit to eye examinations but also tends to result in the purchase of completed pairs of spectacles. * * * Thus, any statute which regulates advertising in regard to eye examinations (that is, for eye diseases and for refraction, by one qualified to recognize, if not treat, diseases of the eye) or other advertising which promotes the sale of eyeglasses (particularly the original pair) upon mere merchandising principles rather than in regard to the actual visual need, can be deemed rationally related to the public health and welfare." (R. 55).

Consequently, the court below did not hold invalid the advertising provisions of the Oklahoma Act insofar as they related to the sale of spectacles, lenses, * * * (or) prisms." To do so the court would have had to disregard substantially all the relevant decisions in the same and related fields. See *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608; *Dr. Bloom Dentist, Inc.* v. *Cruise*, 259 N. Y. 358, 182 N. E. 16, appeal dismissed 288 U. S. 588; *Klein* v. *Dept. of Registration and Education*, 412 Ill. 75, 105 N. E. (2d) 758, cert. den. 344 U. S. 855; *Lasdon* v. *Hallihan*, 377 Ill. 187, 36 N. E. (2d) 237; *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N. E. (2d) 378; *Seifert* v. *Buhl Optical Co.*, 276 Mich. 692, 268 N. W. 784; *Abelson's Inc.* v. *New Jersey State Board of Optometrists*, 5 N. J. 412, 75 Atl. (2d) 867, 22 A.L.R. (2d) 929; *Curtis* v. *Regis-*

tered Dentists of Oklahoma, 193 Okla. 233, 143 P. (2d) 427; *Curtis* v. *State*, 78 Okla. Cr. 282, 147 P. (2d) 465; *Norwood* v. *Parenteau*, S. Ct. of S. D. (1954), 63 N. W. (2d) 807; *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S. E. (2d) 210. But insofar as the advertising provisions of the Oklahoma Act applied to the sale of "frames, mountings, * * * or any other optical appliances," they were constitutionally deficient, in the court's view, because "advertising directed exclusively at this feature of eye wear can have no deleterious effect on the public, inasmuch as it has no influence on the *prospective* wearer of eyeglasses, and to the *present* wearer (a person already examined by a licensed professional) is but a mere piece of merchandise." (R. 58).[26]

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[26] We believe that the foregoing is the essence of the court's opinion on this point. Although the court pointed out that the Oklahoma Act was a prohibition rather than a mere regulation of advertising (120 F. Supp. at 141), that could not have been a vital distinction in the court's view, inasmuch as it did not hold invalid the so-called prohibition with respect to "spectacles, eyeglasses, lenses, * * * (or) prisms." In any event, the prohibition of all non-professional advertising by optometrists has been sustained. *Norwood* v. *Parenteau, supra;* but cf. *State* v. *Rones*, 223 La. 839, 67 So. (2d) 99. Moreover, the Oklahoma Act is no more of a prohibition than the sum of the restrictions spelled out in detail in many of the state statutes, *supra*, n. 23.

The Oklahoma Act specifically provides in section 3 that nothing contained in the Act shall "prevent the use of ethical, professional notices," and to that extent does not prohibit legitimate professional advertising. The Rules of Practice of the American Optometric Association, adopted June 28, 1950, provide in this regard as follows:

> E. No member shall display his license, diplomas, or certificates in such manner as to be seen and read from outside his office.
>
> F. No member shall hold himself forth in such a way as to carry the slightest intimation of having superior qualifications or being superior to other optometrists.
>
> G. No member holding an official position in any optometric organization shall use such position for advertising purposes or for self-aggrandizement.
>
> H. No member shall display any sign containing other than name, profession, and office hours; same to be used only on office windows or at entrance to his office. Letters must

The court's decision, then, turns essentially on what it believed to be a distinction between eyeglass lenses and eyeglass frames. Substituting its judgment for that of the Oklahoma legislature in flagrant disregard of well-settled judicial principles already referred to, the court isolated "frames, mountings * * * and other optical appliances" from their statutory context and concluded that their sale, unlke the sale of spectacles and eyeglasses, bore no rational relationship to the public health and welfare and that, accordingly, the advertising restrictions as to them were beyond the power of the State of Oklahoma to enact. In so ruling the court below not only misconceived its function as a federal court reviewing State legislation enacted under the police power, but it failed to appreciate the very real and vital relationship to the public health and welfare of the provisions which it invalidated. As Judge Murrah, in his dissent, stated, "considered in isolation, an eyeglass frame or mounting is no more than a mere piece of merchandise. But considered in the context of the total field of visual care, it takes on a significant relationship to the visual needs of the public and ceases

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not be luminous or illuminated and must not be more than 4" in height for street level and 7" in height for office above street level.

I. No member shall display eyeglass signs or painted or decalcomania eyes anywhere.

J. No member shall use other than his professional card on or in any publication or in any public display; said card shall not exceed two (2) columns by two (2) inches, and it shall not contain any more than his name, profession, address, telephone number, office hours, eye examinations by appointment, practice limited to ..... (any one optometric specialty.) Educational material may be published only when it has been specifically approved by the executive committee of the respective state association.

K. No member shall use bold-face type or in any other manner attempt to attract special attention to himself in any telephone or other public directory.

L. No member shall display any merchandise, ophthalmic material or advertising of any kind in windows or in any room of his office for the purpose of inducing patronage.

to be a mere piece of merchandise to be dealt with in the market place on an arm's length basis" (R. 65).

The court refused to find a "significant relationship to the visual needs of the public" in advertising the sale of eyeglass frames, for two main reasons, as we have already pointed out. First, such advertising could have no influence on *prospective* wearers of eyeglasses, and secondly, insofar as *present* wearers are concerned, a frame is but a mere piece of merchandise. A more narrow, unrealistic view can hardly be imagined, a view which "misconceive(s) the public good by confounding private notions with constitutional requirements." Mr. Justice Frankfurter, concurring in *Whitaker* v. *North Carolina*, etc., 335 U. S. at 556.

With respect to *prospective* wearers of eyeglasses, and, indeed, with respect to *present* wearers also, it is absurd to ponder whether an advertisement of a complete pair of eyeglasses (which the court concedes may be controlled) is a greater attractive nuisance than is an advertisement of a frame alone and whether one advertisement is more apt to develop a new eyeglass wearer than the other. Either advertisement might have no effect on some people; both might influence others equally or in different degrees; and some persons might be influenced by one advertisement and not by the other. But these cannot be constitutional differences. It seems clear that the restriction of the advertisement of a frame or mounting, no less than the restriction of the advertisement of a complete pair of eyeglasses, will "tend to diminish an evil" and such restriction is not invalid "because it may not succeed in bringing about the result that it tends to produce." *Roschen* v. *Ward*, 279 U. S. at 339.

Moreover, it is beside the point to say that frames are but a mere piece of merchandise. Many persons also may think of a second pair of eyeglasses as merely merchandise. But the court concedes that restrictions on "advertising which promotes the sale of complete eyeglasses," even second pairs, is valid. (R. 55). The fact is that people do not buy

frames, as such, to be worn without lenses. The only function of frames is to hold lenses in proper position before the eyes. Frames are purchased to be worn with lenses, either as a completely new pair of glasses or to hold old lenses to be inserted in them, and they are not "mere piece(s) of merchandise" in the sense that the court used the phrase. If not correctly made, assembled, and fitted, frames may not only be useless, but affirmatively harmful. Their sale is directly related to the public health and welfare; and advertising restrictions with respect to their sale is also necessarily so related. There is absolutely no basis whatsoever for any distinction between completed eyeglasses and eyeglass frames insofar as advertising restrictions are concerned, and the State of Oklahoma, just as many other states do,[27] was free to include frames,

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[27] The advertising restrictions contained in the legislation of the following states specifically apply to frames, mountings, fittings, optometric materials, etc.: Deering's California Codes (Business and Professions) (1944) sec. 3129; Delaware Code Annot. (1953) Title 24, sec. 2113; Florida Stats. Annot. (1953) sec. 463.14; Jones Illinois Stats. Annot. (1953 Cum. Supp.) sec. 94.29(m); Burns Indiana Stats. Annot. (1951) 63-1019(d), (f); Kentucky Rev. Stats. (1953) secs. 320.020(4), 320.080 (2)(d)(e); Louisiana Rev. Stats. (1950) sec. 1063(9); Annot. Laws of Mass. (1949) c. 112, sec. 73A; Rev. Codes of Montana (1947) sec. 66-1302(11); Nevada Compiled Laws (Supp. 1943-1949) secs. 4982(a)(d); New Jersey Stats. Annot. (Supp. 1953) 45:12-11(j)(p)(r); New Mexico Stats. Annot. (1941) 51-713(k) (m); General Stats. of North Carolina (Supp. 1953) sec. 90-124(3); Oregon Compiled Laws Annot. (1943 Supp.) 54-73(6); General Laws of Rhode Island (1938) c. 277, sec. 11; Supp. to South Dakota Code of 1939, sec. 27.0707; Williams Tennessee Code Annot. (1934) 7028; Utah Code Annot. (1953) 58-16-14(5); Code of Virginia (1950) sec. 54-396(9); Remington's Rev. Stats. of Washington (Annot.) sec. 10152(12); West Virginia Code of 1950 (Annot.), sec. 2927; Wisconsin Stats. (1953) c. 153, sec. 153-10; Wyoming Compiled Stats. (1945) sec. 37-1807(e).

The advertising restrictions in the following states are applicable generally and are not limited to eyeglasses, lenses, or prisms only: Code of Alabama (1940) Title 46, sec. 211; Idaho Code Annot. (1948) sec. 54-1512; Rev. Stats. of Maine (1944) c. 69, sec. 14V; Annot. Code of Maryland (Flack, 1951) Art. 43, sec. 358; Mich. Stats. Annot. (1937) c. 123, sec. 14.648(h); Minn.

mountings and other optical appliances within the scope of its legislation. See cases cited *supra*, pp. 38-39.

Interstate Commerce—Plaintiffs also contend that the advertising restrictions of section 3 of the Oklahoma Act are invalid under the commerce clause of the federal Constitution because they prohibit advertising by radio, television, newspapers and other media of interstate communication. Although the court below made no reference to the contention, it necessarily must have rejected it because it failed to hold the advertising restrictions invalid insofar as they related to "spectacles, eyeglasses, lenses * * * (or) prisms." It could not have done so, if it had thought that plaintiffs' contention as to the commerce clause had any merit. In any event, the contention is plainly unsound.

The advertising restrictions of section 3 were adopted by the Oklahoma legislature in furtherance of its public policy, expressed in section 1, that "citizens of the State of Oklahoma shall receive the best possible visual care." In order to protect its citizens from the evils of advertising in this field, the State undertook to suppress the evil wherever it might show up, and, accordingly, it included within the scope of the prohibition the communication media of television, newspaper, radio, etc. That a local newspaper might ultimately be sold in another state, or a television or radio program might also be heard out-of-state was purely incidental. The statutory regulation is essentially and in its overwhelming impact a local regulation; it makes no discrimination in any fashion against interstate trade or commerce, and such incidental effects as it might conceivably have on such trade or commerce, although we know of none, are purely collateral, insignificant, and in

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Stats. Annot. (1946) sec. 148.57 sub. 3; Vernon's Annot. Missouri Stats. (1952) sec. 336.110(1)(5); Rev. Stats. of Nebraska (1943) sec. 71-147, 71-148; Williams Tennessee Code Annot. (1934) sec. 7028; Remington's Rev. Stats. of Washington Annot., sec. 10152(10), (13)-(15).

violation of no known national regulations or policies.[28] If the commerce clause were held to prevent the enactment of the advertising limitations contained in section 3, insofar as radio, television and newspapers are concerned, because the programs might be heard in other states, or the papers sold out-of-state, then the State of Oklahoma would be helpless to control an evil within its own borders. The federal Constitution would become an instrument of destruction for otherwise valid state legislation, and in aid of no national policy or purpose. The advertising restrictions contained in the legislation of all states regulating advertising in the field of visual care, and we have already referred to many such state statutes, would fall as invalid. And the decisions of the state courts upholding the advertising regulations of the various states would, in effect, be overruled. See e.g., cases cited *supra*, pp. 38-40. The

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[28] In the court below, plaintiffs relied on *Lorain Journal Co.* v. *United States*, 342 U. S. 143, for the proposition that local advertising by means of newspapers, etc. constituted "an inseparable part of the flow of the interstate commerce." Of course, the Court in the *Lorain Journal* case was concerned only with the dissemination locally "of news of out-of-state events transmitted to Lorain for immediate dissemination and of advertising of out-of-state products for sale in Lorain." 342 U. S. at 150-151. The Court specifically did not pass on the question whether "the out-of-state distribution of some copies of the Journal, coupled with the considerable interstate commerce engaged in by its publisher in the purchase of its operating supplies, provided * * * a sufficient basis for classifying the publisher's entire operation as one in interstate commerce." 342 U. S. at 150. That is the only possibility of interstate commerce here, and the *Lorain Journal* decision, therefore, is in no way relevant. Further, it cannot be contended that the inclusion or exclusion of plaintiffs' advertisements has any effect whatsoever on the interstate distribution of any newspapers published in Oklahoma or on the extent of out-of-state transmission of a radio or television program. If it be suggested that the restrictions of section 3 might result in some person out of the State of Oklahoma not coming into the State of Oklahoma to purchase his glasses, the short answer is that such a sale as is thereby lost is an Oklahoma sale and not an interstate transaction. Moreover, the mere making of the suggestion illustrates how really minimal is the out-of-state effect of section 3.

Oregon legislation involved in this Court's decision in the *Semler* case, 294 U. S. 608, was not limited to advertising in completely local media. Indeed, the plaintiff in that case advertised in newspapers and periodicals. A decision sustaining plaintiffs' contention here on the interstate commerce issue would, in effect, overrule *Semler*.[29]

But the decisions of this Court make it abundantly clear that the commerce clause is no bar to the enactment of section 3. In *Breard* v. *Alexandria*, 341 U. S. 622, this Court sustained, against a contention based on the interstate commerce clause, the validity of an ordinance of a Louisiana municipality making unlawful the practice of door-to-door soliciting of orders for the sale of goods, as applied to a representative of a Pennsylvania corporation soliciting subscriptions for nationally known magazines. In *Parker* v. *Brown*, 317 U. S. 341, California legislation authorizing programs imposing restrictions upon the sale of raisins by producers to processors was sustained even though ninety-five percent of the raisin crop found its way into interstate commerce. In *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, this Court sustained state legislation regulating the weight of trucks on its highways, applicable equally to vehicles moving in interstate as well as in intrastate commerce. And in *Railway Express Agency* v. *New York*, 336 U. S. 106, this Court upheld an ordinance of the City of New York which prohibited the operation of advertising trucks on the city streets, even those "engaged in delivering goods in interstate commerce from New Jersey to New York." 336 U. S. at 111. See also *Packer Corp.* v. *Utah*, 285 U. S. 105. The rationale of these cases was aptly set forth by Mr. Chief Justice Stone in *Parker* v. *Brown*, *supra*, at 362-363:

> * * * When Congress has not exerted its power under the Commerce Clause, and state regulation of matters

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[29] Such a decision would logically not be limited to the field of optometry and visual care. All state restrictions on newspaper and radio advertising in all professions would be placed in jeopardy.

> of local concern is so related to interstate commerce, that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. * * *
>
> Such regulations by the state are to be sustained, not because they are "indirect" rather than "direct," * * * not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health, and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause.

We have found no federal case, and plaintiffs cite none, which in any way lends support to the contention that section 3 violates the commerce clause of the Constitution.[30] Indeed, the cases are clearly to the contrary.

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[30] The Utah decision relied on by plaintiffs (*State* v. *Salt Lake Tribune Publishing Co.*, 68 Utah, 187, 249 Pac. 474) is not in accord with the constitutional principles enunciated by the foregoing decisions of this Court, and, in any event, the decision is not in point here. In that case, the advertisement was itself an interstate advertisement and not a local one such as in this case. Plaintiffs in this case assert no interstate advertisements which the statute prevents them from purchasing. See *Packer Corp.* v. *Utah*, 285 U. S. 105, 112 ("Whatever may be the limitations upon the power of the state to regulate solicitation and advertisement incident to an exclusively interstate business, the commerce clause interposes no barrier to its effective control of advertising essentially local.")

III

The Challenged Provisions of Section 4 of the Oklahoma Act Do Not Offend Any Provision of the Federal Constitution

The court below held invalid that portion of section 4 of the Oklahoma Act which provides that "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store." The court, assuming that the sole purpose of the provision was to prohibit corporate practice in the professions of optometry and ophthalmology, found that the provision "was not reasonably adapted to the accomplishment of the end sought," was "arbitrary and oppressive," and constituted an "arbitrary interference with the right of contract." (R. 59, 60). While we need not repeat here in any detail that, in so holding, the court violated the well-settled applicable principles of judicial review, we must emphasize that the court, in our opinion, struck down section 4 solely because it "disagree(d) with the desirability of the legislation," (*Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, 224) and for no other conceivable reason. The court below should not have failed, as we think it did, to discover the very real and close relationship of the provisions of section 4 here involved to the public health and welfare of the people of the State of Oklahoma, and the complete absence of arbitrariness or oppressiveness in their enactment. As Judge Murrah stated in his dissent, it is the court's judgment itself which "is an unwarranted interference with the police power of the state over a subject with which the state is fully competent to deal." (R. 67).[31]

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[31] Judge Murrah appropriately stated further: "In cases of this kind we ought to keep in mind the extremely limited restrictions that the due process clause of the Fourteenth Amendment places upon the state; and that the federal courts should negatively inject themselves into the policy making powers of the state only in the presence of a palpable abuse of the due process clause of the constitution." R. 68.

Section 4 of the Oklahoma Act includes much more than the particular provision with which we are here concerned. Section 4 prohibits optometrists and physicians from receiving rebates or kick-backs from optical companies or from any person, firm, or corporation dealing in optical goods or appliances. It prohibits optometrists and physicians from permitting any person engaged in or interested in the sale of optical goods to solicit business for them. It prohibits optometrists and physicians from making an eye examination or doing visual correction as an employee of any person, firm, corporation, lay body, organization, or group. Likewise it makes it unlawful for any corporation, lay body, organization, group or lay person to make an eye examination or perform any visual correction by means of engaging on a salary, commission or any other compensatory basis the services of a licensed optometrist or physician. And finally, section 4 contains the provision with which we are now concerned.

It is at once apparent that in section 4, the Oklahoma legislature was providing statutory safeguards, in addition to those set forth in the Oklahoma Optometry Act (Oklahoma Stats. Annot. Title 59, secs. 581, et seq.) to assure that the visual care professions in the State of Oklahoma would be practiced on a highly ethical and professional level, and would be free, to as great an extent as possible, from all taints of commercialism. That such legislation is within the constitutional authority of the state to enact and does not unconstitutionally interfere with any contractual rights would seem to have been settled by the decisions of this Court a long time ago. See *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 610-613; *Roschen* v. *Ward*, 279 U. S. 337; *State Board of Dental Examiners* v. *Miller*, 90 Colo. 193, 8 P. (2d) 699, appeal dismissed 287 U. S. 563; *Hayman* v. *Galveston*, 273 U. S. 414; *McNoughton* v. *Johnson*, 242 U. S. 344.

This Court has held, with respect to the practice of a profession, "that the State may deny to corporations the

right to practice, insisting on personal obligations of individuals." *Semler* v. *Oregon State Board of Dental Examiners, supra,* at 611; see also *State Dental Examiners* v. *Miller, supra.* And while the court below conceded such authority in the state, it held that the mere fact that illegal corporate practice has taken place, in some instances, where corporations subleased space to professional eye examiners, "the correlation between the evil sought to be prevented and the one circumstance singled out and prohibited is not sufficient to authorize such a police power regulation". (R. 59). "Whether a professional man indulges in corporate practice, in violation of a statutory prohibition, is a matter of his individual integrity rather than his geographic location." (R. 60).[32]

It is difficult to rationalize this conclusion of the court below. It cited, with apparent approval, and quoted from *Sears Roebuck & Company* v. *State Board of Optometry,* 213 Miss. 710, 57 So. (2d) 726 and *Neill* v. *Gimbel Bros., Inc.,* 330 Pa. 213, 199 A. 178, cases which aptly illustrate the extreme efforts made by department stores and mercantile establishments to evade the corporate practice prohibitions of the various state statutes through various kinds of leasing arrangements made with registered optometrists and physicians. See also *State ex rel Beck* v. *Goldman Jewelry Co.,* 142 Kan. 881, 51 P. (2d) 995; *Ritholz* v. *Arkansas State Board,* 206 Ark. 671, 177 S. W. (2d) 410; *State ex rel Bricker* v. *Buhl Optical Co.,* 131 Ohio St. 217, 2 N. E. (2d) 601; *Rowe* v. *Standard Drug Co.,* 132 Ohio St. 629, 9 N. E. (2d) 609; *State* v. *Kindy Optical Co.,* 216 Iowa 1157, 248 N. W. 332; *Ritholz* v.

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[32] Of course, the challenged provision of section 4, contrary to the court's assumption, is not limited to corporations. It forbids "any person, firm, or corporation engaged in the business of retailing merchandise" from renting space in such retail store to optometrists or ophthalmologists. We assume that when the court spoke of "corporate practice," it meant practice by a non-professional commercial interest, corporate or otherwise.

Commonwealth of Virginia, 184 Va. 339, 35 S. E. (2d) 210; *State ex rel Loser* v. *National Optical Stores Co.*, 189 Tenn. 344, 225 S. W. (2d) 293; see also Notes, 102 A.L.R. 334 and 128 A.L.R. 585. The court, therefore, was not unaware of either the evils involved in the practice of medicine and optometry by nonprofessional commercial interests through employment of registered optometrists or physicians or of the devious efforts made to evade the statutory restrictions on corporate practice. Nor could the court have been unaware of the enforcement burden placed on the law enforcing officials to assure that an optometrist or ophthalmologist practicing or leasing space in a department store was really not an employee of the company. For a federal court, in the circumstances, to say that a state legislature could not constitutionally find that the leasing provision of section 4 would "tend to diminish an evil" (*Roschen* v. *Ward*, 279 U. S. 337, 339) inherent in the practice of the visual care professions by nonprofessional commercial interests through the device of hiring a licensed optometrist or physician "take(s) a degree of omniscience which" we believe the court lacked. *Railway Express Agency* v. *New York*, 336 U. S. 106, 110.

It seems abundantly clear to the point of being obvious that to forbid retail merchandising establishments from making space in their stores available to licensed optometrists or physicians, either by lease or otherwise, almost necessarily results in diminished interest and effort by those mercantile interests to engage in the illicit business arrangement. It is almost certain that the owners of retail merchandise stores would have very little interest in establishing Dr. Smith in a professional office of his own, disassociated from their commercial enterprise. Similarly, Dr. Smith would have very little interest in such an arrangement. Contrary to what the court below said, the "geographic location" is all important. In any event, the

Oklahoma legislature could reasonably so conclude.[33] The fact that some leasing arrangements would fall which did not involve illegal practice by commercial interests is, of course, immaterial. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 613. The court's assertion about "individual integrity" being the important factor in whether a person would engage in an unlawful enterprise is a gratuitous assertion entirely beside the point. On that basis, no regulatory laws of any kind are required, because people of "individual integrity" will do no wrong.

Moreover, the provision of section 4 here involved has a very real purpose quite apart from its effect in preventing illegal commercial practice. It is intended to do just what it says and that is to keep the practice of optometry and ophthalmology out of retail merchandise stores and in private professional offices where they belong. A state has an interest in seeing that a profession practiced within its borders is practiced in a professional atmosphere. Cf. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 612. It can require that optometry and medicine not be practiced from door-to-door or outside of an office or fixed place of business. *Harris* v. *State Board of Optometrical Examiners*, 287 Pa. 531, 135 Atl. 237; *Saunders* v. *Swann*, 155 Tenn. 310, 292 S. W. 458; see also *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 56 N. E. (2d) 185; *Baccus* v. *Louisiana*, 232 U. S. 334. That being so, it certainly can require that

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[33] As the cases cited show, a mere prohibition of corporate practice without more, is not sufficient to prevent all sorts of attempts at evasion by sham leasing and fee arrangements, with the result that each time an optometrist or physician is found practicing in a retail mercantile establishment, state law enforcing officials are called upon to make detailed investigations and then to engage in litigation through the highest courts of the state in order to prevent evasion of the law. The elimination of this administrative and enforcement difficulty, by an absolute prohibition of the practice of optometry and medicine in mercantile stores, is alone sufficient justification for the enactment of the challenged provision.

optometry and ophthalmology not be practiced in the middle of a department store. The public is attracted into a department store or other retail merchandise establishment for a variety of reasons. An attractive advertisement, a special bargain sale, the need for an article of clothing, or the mere desire to go shopping, may attract an individual into a store. But no one of these reasons should be the occasion for a professional eye examination. It cannot be doubted that the presence of an optometrical or ophthalmological department in a retail establishment would tend to induce many people who had entered the store for wholly different and unrelated purposes to have their eyes examined there.[34] The uncontrolled advertising and commercialization of the market place would, in a substantial degree, intrude into the visual care profession, evils which the state, if it so desires, should certainly be free to exclude.[35]

It cannot validly be suggested that there is no evil in these arrangements because they result in a person having his eyes examined when he might not otherwise have done so, and the examination is made by a professional optometrist or physician. To be sure, there is much good

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[34] While it is true that an office on the ground floor of a building on a downtown street might also attract some people passing by, the difference is apparent. A person already in a store is much more susceptible than a person outside on his way elsewhere. Moreover, we know of no reason why professional optometrists or physicians cannot be required to practice in office buildings. That Oklahoma has not seen fit to do so, of course, does not make the present regulation invalid.

[35] Judge Murrah, in his dissent, (R. 66-68) vividly points out the evils, in this very case, which the decision of the court below permits to continue. It is interesting to note that Dr. Rips, a licensed physician (not an optometrist), entered into his lease arrangement with Zales Jewelry Company on June 17, 1953, only three days before the Governor of Oklahoma approved the legislation here under consideration (R. 5). The complaint, filed on September 2, 1953, one day before the effective date of the legislation (R. 3, 5) alleges the value of the lease to Dr. Rips to be "at least $10,000" (R. 12). At the trial, Dr. Rips testified that the lease from Zales Jewelry was worth $25,000. (R. 200).

to be gained in periodic eye examinations, just as there is much good to be gained in periodic medical examinations. But that is not the point. In spite of that good, it is concededly an evil that professional services be obtained as a result of advertising, and the state, concededly, can prevent that from happening. So, too, is it an evil that professional services be obtained as a mere incident to a downtown shopping trip to a department store. The evil does not lie in the fact that an examination was had, but in the fact that the particular optometrist or physician was consulted, not because of any particular professional skill, but because he happened to be located in the middle of a retail commercial establishment. Such reasons for the development of a professional practice inevitably "tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous" (*Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 612.) Practitioners, in the long run, would be more concerned in "setting up shop" in the right "spot" than in developing their professional skills and proficiency. The end result is incompetency in the professional service and lack of ethics in the profession. This the state can protect against. *Dent* v. *West Virginia*, 129 U. S. 114, 122.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court below holding certain portions of Oklahoma Enrolled House Bill No. 953 (Okla. Stats. Annot., Title 59, secs. 941-947) unconstitutional should be reversed.

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APPENDIX

The relevant provisions of Oklahoma Enrolled House Bill No. 953 (Okla. Stats. Ann., Title 59, §§ 941-947) are as follows:

SECTION 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another.

SECTION 2. It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951, to fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951 may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames, or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Sec-

tion shall not prevent a qualified person from making repairs to eye glasses.

SECTION 3. It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction. Provided, however, that the provisions of this Act shall not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vandor of said commodity or material; nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

SECTION 4. It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction to receive or accept any rebate, kick-back, reward or premium from any optical company or any other person, firm or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes. It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of

a person, firm, corporation, lay body, organization, group or lay person and it shall be likewise unlawful for any corporation, lay body, organization, group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of a person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951, provided that this sentence shall not apply to the University of Oklahoma School of Medicine and Hospitals, or to a bona fide resident physician of a licensed hospital. No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store. Nothing in this Section shall prohibit a person licensed under Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes, from organizing or maintaining a professional association with other persons so licensed.

* * * *

SECTION 6. Any person, firm company, corporation, or partnership violating any of the provisions of this Act shal be guilty of a misdemeanor and upon conviction thereof shall be punished for each such offense, as provided by law, and in addition thereto may be enjoined by a Court of competent jurisdiction for any further violations of the provisions of this Act. It shall be the mandatory duty of the county attorneys of the respective counties to bring such injunction suits when a verified complaint is filed with such county attorney alleging any violations of this Act. This Act shall not supersede other laws, but shall be cumulative to other statutes of the State of Oklahoma.

SECTION 7. If any of the provisions of this Act shall be held by a Court of competent jurisdiction to be inapplicable to a specific person or set of circumstances, the same shall not affect the validity of this Act in regard to other persons or circumstances.

* * * *

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

Mac Q. Williamson, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., *Appellants,* v. Lee Optical of Oklahoma, Inc., a corporation; Ellis Carp, doing business as Douglas Optical; and Oran Rips, *Respondents.*	No. 184
Lee Optical of Oklahoma, Inc., a corporation; Ellis Carp, doing business as Douglas Optical; and Oran Rips, *Appellants,* v. Mac Q. Williamson, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., *Respondents.*	No. 185

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA IN SUPPORT OF THE POSITION OF THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA

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TOPICAL INDEX

Page

I. INTEREST OF ATTORNEY GENERAL OF CALIFORNIA IN FILING THIS AMICUS CURIAE BRIEF 1

II. RESUMÉ OF CALIFORNIA LAW WHICH MAY BE AFFECTED BY DECISION 3

III. SELF-TREATMENT IS DISTINGUISHABLE 6

IV. THE FITTING OF FRAMES TO THE FACE CAN BE REGULATED BY STATE LEGISLATION 11

V. CONCLUSION 12

LIST OF AUTHORITIES CITED

CASES

Barsky v. Board of Regents of New York (1954), 347 U. S. 442, 74 S. Ct. 650 12

McNaughton v. Johnson (1916), 242 U. S. 344, 64 S. Ct. 192 5

Railroad Express Agency, Inc., v. People of the State of New York (1948), 336 U. S. 106, 69 S. Ct. 463 8

STATUTES

California Business and Professions Code, Section 2137 3

California Business and Professions Code, Section 2144 7

California Business and Professions Code, Section 2550 ..... 2, 3

California Business and Professions Code, Section 2557 ..... 3, 5

California Business and Professions Code, Section 3019 2

California Business and Professions Code, Section 3041 3

California Business and Professions Code, Section 3042 3

California Business and Professions Code, Section 3043 5

SUPREME COURT OF THE UNITED STATES

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AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA IN SUPPORT OF THE POSITION OF THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA

I. INTEREST OF ATTORNEY GENERAL OF CALIFORNIA IN FILING THIS AMICUS CURIAE BRIEF

The opinion of the United States District Court in the above-entitled cause (120 Fed. Supp. 128) contains premises which, if allowed to stand by the Supreme Court, will have an adverse effect upon the efforts of the People of the State of California to protect the health of the citizens of this State in the

field of ophthalmology and optometry. Since 1903 the practice of optometry has been regulated in California, and since 1939, the practice of dispensing opticians has been regulated. The California Board of Optometry has jurisdiction over optometrists (California Business and Professions Code, Section 3010) and the California Board of Medical Examiners has jurisdiction over dispensing opticians (California Business and Professions Code, Section 2550). The Attorney General is legal counsel for both state agencies.

The public policy of this State has been decreed that the practice and profession of furnishing and fitting eyeglasses should be regulated so that the public will be served in this field of health by professionally competent persons who are qualified to treat the public. In this respect, the California Legislature has enacted legislation so that the filling of eyeglass prescriptions, the taking of facial measurements and the fitting and adjusting of lenses and frames are part and parcel of this field of the healing arts.

The effect of the Federal District Court's decision is to reject these concepts and policies, and open this part of the healing arts to commercialism and exploitation without the regulating provisions and safeguards which the State of California submits are essential for the protection of the public health. The Attorney General of this State has heretofore joined in and endorsed the brief filed by the Attorney General of Oklahoma. With the Honorable Supreme

Court's permission, he desires to file this supplemental brief to show the impact of the lower court's decision on California law and this State's concern if that decision is allowed to stand.

II. RESUME OF CALIFORNIA LAW WHICH MAY BE AFFECTED BY DECISION

The Business and Professions Code of the State of California regulates and licenses three separate groups of persons engaged in the examination of eyes and the furnishing of eyeglasses to the public to wit: (1) licensed optometrists who examine eyes and who customarily also directly sell and dispense the prescribed eyeglasses but who are not licensed as physicians and surgeons; (2) licensed physicians and surgeons specializing in the treatment and examination of eyes and who, although not forbidden to do so by law, customarily do not sell and dispense eyeglasses to their patients; (3) registered dispensing opticians who in connection with the filling of prescriptions issued by physicians and surgeons are authorized to engage in "taking facial measurements and fitting and adjusting lenses or frames." (California Business and Professions Code, Section 2550.)*

* Sec. 2550. "Individuals and firms filling prescriptions of physicians and surgeons licensed by the Board of Medical Examiners for ophthalmic lenses and kindred products, and, as incidental to the filling of such prescriptions, taking facial measurements and fitting and adjusting lenses or frames, shall be known as dispensing opticians and shall not engage in such business unless registered with the Board of Medical Examiners."

The definition of the practice of optometry set forth in the California Business and Professions Code not only embraces the activity of making a refraction of the eye for the purpose of determining vision but includes also the separable activity of "the adaptation of lenses or frames for the aid thereof." (California Business and Professions Code, Section 3041.)** Physicians and surgeons under the broad general provisions of California law defining the practice of medicine are also licensed to adapt lenses and frames to the eye. (California Business and Professions Code, Sections 2137, 2557 and 3042.)

Thus, the provisions of California law dealing with visual eye care expressly provide that the adaptation of lenses and frames to the eye is a licensed activity entirely separable from the licensed activity of mak ing an eye examination. Only duly licensed persons may adapt and fit lenses to the eye to wit: optometrists, physicians and surgeons, and dispensing opticians.

** Sec. 3041. "The practice of optometry is the doing, without the use of drugs, of any or all of the following acts, either singly or in combination with others:

(a) The measurement of the powers or range of human vision or the determination of the accommodative and refractive states of the human eye or the scope of its functions in general or the adaptation of lenses or frames for the aid thereof.

(b) The prescribing or directing the use of, or using, any optical device in connection with ocular exercises, visual training, vision training, or orthoptics.

(c) The prescribing of contact lenses for, or the fitting or adaptation of contact lenses to, the human eye."

The California laws require that each of said licensed persons must conform with prescribed standards of experience and knowledge in order to be licensed. The laws of California thus recognize that the separable activity of adapting lenses and frames to the eye is a function materially affecting the public health and welfare and, therefore, may be justifiably regulated and licensed (See *McNaughton* v. *Johnson* (1916), 242 U. S. 344, 64 S. Ct. 192.)

The adaptation of lenses and frames to the eye requires the measurement of pupilliary distances; measurement of the distances between the pupils of the two eyes so that the pupil of each eye is properly aligned to the center of each lens, fixed ir the frame. The over-all activities of adapting the lenses and frame to the eye, together with the furnishing and selling the glasses is known as dispensing eyeglasses.

Under California law the registered. dispensing optician may use his skill and judgment in adapting the lenses to the eye. The law does not require and the prescription rarely provides any specifications regarding the adaptation of the lenses and frames to the eye.

It is all important to note, however, that while the California laws provide that any person engaging in the practice of adapting lenses and frames to the eye must be licensed, the California laws do not regulate or license or "prohibit the sale of complete ready-to-wear eyeglasses as merchandise." (California Business and Professions Code, Sections 2557 and 3043.)

Thus, retail stores may sell complete eyeglasses with corrected lenses under circumstances where the customer selects the eyeglasses and where no unlicensed person in connection with the sale engages in the activity of adapting lenses or frames to the eye.

The opinion of the Federal District Court contains statements which may be construed as holding that legislation regulating and licensing persons engaged in the activity of adapting lenses and frames to the eye, similar to that found in the California statutes, is invalid in the following respects: (1) that any such legislation is invalid which at the same time exempts from regulation or licensing, sellers of ready-to-wear eyeglasses; (2) that the activity of adapting lenses and frames to the eye may not be regulated or licensed because the activity is not clothed with a public interest.

III. SELF-TREATMENT IS DISTINGUISHABLE

The opinion of the district court states:

> "In addition, and of even more significance, is the fact that section 3 exempts from regulation all sellers of ready-to-wear glasses, even though such sellers, from the viewpoint of public health and welfare, lie within the identical class and circumstance occupied by 'fitters and sellers of frames' and 'duplicators of lenses and entire spectacles.'
>
> "In the instant legislation not only is the 'relation to the object of the legislation' questionable (as previously discussed) but 'all persons similarly circumstanced' pointedly have not been treated

alike. Persons who sell frames (incidentally adapting and fitting the completed spectacles to the face), persons who duplicate original eyeglasses and market the duplicated spectacles, and persons who sell ready-to-wear glasses are identically situated; that is, all are sellers of merchandise which is not immediately connected with or supervised by a professional eye examiner. Yet the public health and welfare is touched in the same manner and degree by each of these groups inasmuch as the possible result is exactly the same; people may wear spectacles which are not best suited for their eyes." (120 Fed. Supp. at pp. 138-139.)

The district court has failed to properly discern the important distinctions involved where eyeglasses are purchased in a retail store and where eyeglasses are procured from a third person engaged in dispensing eyeglasses.

In both cases there is a sale of merchandise. However, in the one case a third person in the pursuit of an occupation or calling adapts the lenses and frames to the eye. In the other case the person purchasing the glasses, personally adapts the lenses and frames to his eyes—if it can be said there is any adaptation in that case—without the intervention of any third person. In this latter case there is no reliance upon the competence of another person.

The California Medical Act specifically exempts from its provisions "the domestic administration of family remedies." (California Business and Professions Code, Section 2144.) Surely it cannot be seri-

ously contended that the laws regulating and licensing a physician and surgeon are invalid because a patient may engage in the same activity for himself and without any regulation. Regulatory laws are replete with instances where an occupation or calling is licensed but the performance of the same activity in one's own behalf is entirely exempt from regulation. Considerations of public interest are entirely different in the one case than in the other.

Furthermore, and even if it could be said that any public interest exists in regulating the activity of persons who sell eyeglasses under circumstances where the purchasers themselves adapt the lenses and frames to their eyes, the absence of regulation under such circumstances is not justifiable grounds for invalidating legislation licensing persons engaged in the calling of adapting lenses and frames to the eye. Aside from the obvious distinctions which exist, the Legislature may validly regulate one type of activity without being required to occupy by regulation, a related activity.

Application of this principle was clearly expressed by the Supreme Court in *Railroad Express Agency, Inc.* v. *People of the State of New York* (1948), 336 U. S. 106, 69 S. Ct. 463.

In that case a regulation of the City of New York prohibited advertising on vehicles in the city streets but permitted the placing of business notices upon business delivery vehicles so long as such vehicles are engaged in the usual business or regular work of the owner and not used mainly for advertising. The Rail-

way Express Agency challenged the regulation in connection with the sale by it of advertising space to third persons on the exterior sides of its trucks. In upholding the validity of the regulation the Supreme Court said:

> "The question of equal protection of the laws is pressed more strenuously on us. It is pointed out that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet, the regulation allows the latter to do what the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.
>
> "That, however, is a superficial way of analyzing the problem, even if we assume that it is premised on the correct construction of the regulation. The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is

not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.

"We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection.

"It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. *Patasone* v. *Pennsylvania,* 232 US 138, 144, 58 L ed 539, 543, 34 S Ct 381; *Marcus Brown Holding Co.* v. *Feldman,* 256 US 170, 198, 199, 65 L ed 877, 888, 41 S Ct 465; *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 US 580, 585, 586, 79 L ed 1070, 1073, 55 S Ct 538.

"And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all. *Central Lumber Co.* v. *South Dakota,* 226 US 157, 160, 57 L ed 164, 169, 33 S Ct 66."

IV. THE FITTING OF FRAMES TO THE FACE CAN BE REGULATED BY STATE LEGISLATION

The opinion of the district court states:

> "The evidence indicates, almost without variance, that written prescriptions issued by the professional examiner contain no directive data in regard to the manner in which the spectacles are to be fitted to the face of the wearer. In addition, the Court is satisfied that the mere fitting of frames to the face, where the old lenses are available, is in reality only an incident to what fundamentally is a merchandising transaction, that is, the sale of a pair of frames; and, in any event, the knowledge necessary to perform these services is strictly artisan in character and can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist." (120 Fed. Supp. at p. 135.)

Here again the court fails to properly distinguish the separable activities involved. The physical task of duplicating a lens without contacting the patient is one thing. The activity of adapting the lenses and frame to the eyes and face of the wearer is an entirely different operation.

The duplication of the lens is a mechanical shop operation. The adaptation of the lenses and frame to the eye is an activity in the pursuit of a calling involving personal contact with the patient. Proper performance of the function requires skill and judgment and additionally so because the prescription

does not specify any particulars regarding the adaptation. The contact with the patient relates to a part of the human body—the eye—which from a utilitarian standpoint is commonly regarded as the most important of all.

State legislation providing that only licensed persons with prescribed qualifications may engage in the calling of adapting lenses and frames to the eye is legislation in the public interest in that the public health and welfare is involved. The term health in its broadest sense relates to all matters pertaining to the well-being, personal comfort and soundness of the human body.

Public health in all its aspects is a paramount subject for the exercise of the police power by the State, *Barsky* v. *Board of Regents of New York* (1954), 347 U. S. 442, 74 S. Ct. 650.

> "It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health." (P. 449.)

V. CONCLUSION

The Attorney General of the State of California respectfully submits the holding of the federal district court in the instant case declaring certain portions of the Oklahoma statute regulating visual care unconstitutional is erroneous; that state legislation

regulating and licensing persons engaged in fitting and adapting lenses to the eyes is valid even though it exempts sellers of ready-to-wear eyeglasses; and that the calling of adapting lenses and frames to the eyes may be regulated or licensed because the activity is directly within the field of the protection of public health and welfare.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL, APPELLANTS,

vs.

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS, APPELLEES.

No. 185

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS, APPELLANTS,

vs.

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF OF AMICUS CURIAE
STATE OF KANSAS, ON THE RELATION OF HAROLD R. FATZER, ATTORNEY GENERAL.

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INDEX.

	Page
Opinions Below	1
Question Presented	2
Statutes Involved	2
Interests of Amicus Curiae	4
Statement	5
Summary of Argument	10
Argument:	
I. Purpose of Law is to Place Visual Care of the Public Under Licensed and Qualified Professional Persons	13
II. Visual Care of Public is Within Police Power and Constitutionality of Statute is Presumed Unless Statute is Clearly Arbitrary and Capricious	18
III. The Evidence Shows Sufficient and Substantial Reasons for Enactment of Section 2 of House Bill No. 953	23
Conclusion	28

CITATIONS.

Cases. Page

Abelson's vs. New Jersey State Board of Optometrists, 5 N. J. 412, 75 A. 2d 867, 22 ALR 2d 929... 19

Collins vs. Texas, 223 U. S. 288, 297, 56 L. ed. 439, 445 22

Graves vs. Minnesota, 272 U. S. 425, 428, 71 L. ed. 331, 335, 47 Sup. Ct. Rep. 122..... 26

McNaughton vs. Johnson, 242 U. S. 344, 61 L. ed. 352, 37 Sup. Ct. Rep. 178..... 19

Roschen vs. Ward, 279 U. S. 337, 73 L. ed. 722, 49 Sup. Ct. Rep. 336.....19, 27

Sproles vs. Binford, 286 U. S. 374, 388, 389, 76 L. ed. 1167, 1179, 52 Sup. Ct. Rep. 581..... .26

Williams vs. Baltimore, 289 U. S. 36, 41, 77 L. ed. 1015, 1021, 53 Sup. Ct. Rep. 431.....18, 26

Oklahoma Statutes.

Chapter 11, Title 59, Oklahoma Statutes 1951 14

Chapter 13, Title 59, Oklahoma Statutes 1951..... 14

Chapter 24, Title 59, Oklahoma Statutes 1953 Supp.; 59 Okl. St. Ann. Sections 941-947..... 2

Section 1 of House Bill No. 953 (59 O. S. Supp. 1953, Section 941; 59 Okl. St. Ann. Section 941)..... 15

Section 2 of House Bill No. 953 (59 O. S. Supp. 1953, Section 942; 59 Okl. St. Ann. Section 942) 3, 4, 6, 7, 10, 11, 13, 16, 17

Kansas Statutes.

General Statutes of Kansas, 1949, 65-1504 (b)..... 4

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OPINION BELOW.

The opinion (R. 36) and partial dissent thereto (R. 62) of the United States District Court for the Western District of Oklahoma is reported at 120 F. Supp. 128.

QUESTION PRESENTED.

The questions presented in Appeal No. 184 are whether certain provisions of the Oklahoma Statutes relating to visual care are unconstitutional and void under the Constitution of the United States. Although these appeals involve the constitutionality and validity of several and various provisions and sections of the Oklahoma statute, this brief of the State of Kansas as amicus curiae is confined and limited to the question of the constitutionality of only one section of the Oklahoma statute and to only that portion of the District Court judgment and decree declaring that section unconstitutional and void.

The question presented by this amicus curiae brief is whether that portion of the Oklahoma statute is unconstitutional and void which makes it unlawful for any person not a licensed optometrist or ophthamologist to fit, adjust, adapt or to in any manner apply lenses, frames, prisms or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction or which are intended to aid human vision, except upon prescriptive authority of a licensed physician or optometrist.

STATUTES INVOLVED.

The statutes of the State of Oklahoma involved were enacted as House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 24, Title 59, Oklahoma Statutes 1953 Supplement; 59 Okl. St. Ann.

Sections 941-947). Although several sections of said Oklahoma statute are involved in these appeals, this amicus curiae brief is solely concerned with the provisions of Section 2 of House Bill No. 953 (59 O. S. Supp. 1953, Section 942; 59 Okl. St. Ann. Section 942) which provides:

> "It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951, to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951 may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses."

INTEREST OF AMICUS CURIAE.

The State of Kansas, by and on the relation of its Attorney General, enters its appearance in Appeal No. 184 and files its brief as amicus curiae under Rule 42 by reason of its great interest in the constitutionality and validity of the Oklahoma statutes involved, particularly the provisions of Section 2 of said House Bill No. 953 quoted above. The legislature of the State of Kansas has previously enacted statutes concerning visual care. General Statutes of Kansas 1949, 65-1504b provides:

> "It shall be unlawful for any person to dispense an ophthalmic lense or lenses without first having obtained a prescription or order therefor from a duly licensed optometrist, or other person legally permitted to test eyes and fit glasses."

The provisions of the above cited Kansas statute make it unlawful to dispense ophthalmic lenses without a prescription or order from a duly licensed physician or optometrist. Although differing in wording and language, the Kansas statute is similar in meaning and effect to the Oklahoma statute (Section 2 of House Bill No. 953). It is not the contention of the State of Kansas that the Kansas statute includes all the effect and meaning of the Oklahoma statute, but only such meaning and effect as to render the statutes of the two states similar. The judgment and decree of the Oklahoma District Court declaring the Oklahoma statute unconstitutional and void therefore concerns and interests the State of Kansas.

At the present time there is litigation pending in various courts of the State of Kansas involving the constitutionality of the Kansas statute, and in which litigation the Oklahoma District Court decision is being cited to the Kansas Courts as authority. The decision of this Supreme Court may influence the outcome of litigation pending in Kansas courts.

The brief filed herein as amicus curiae by the State of Kansas and sponsored by its Attorney General is filed under the provisions of Section 4, Rule 42, Revised Rules of the Supreme Court of the United States.

STATEMENT.

The Oklahoma statute was enacted as House Bill No. 953 in the 1953 session of the Legislature of the State of Oklahoma. This law was approved by the Governor of Oklahoma on June 20, 1953, and by its terms became effective on September 5, 1953.

On September 2, 1953, and just prior to the Effective date of said House Bill No. 953, the plaintiffs below filed a civil action in the United States District Court for the Western District of Oklahoma, asking said court to enter a declaratory judgment holding said House Bill No. 953 unconstitutional and void and to enter judgment enjoining the Attorney General and county attorneys of Oklahoma from enforcing said law. (R. 1-18)

One of the plaintiffs, Ellis Carp, does business as Douglas Optical, a retail optical dispensing establishment maintained in the Zales Jewelry store, Tulsa, Oklahoma. (R. 205) Ellis Carp leases space from the

Zales Jewelry Company; and in such leased space, he maintains an optical department where he sells lenses, frames and eye glasses. (R. 216) Oran Rips, another plaintiff, is a physician who also leases space from the Zales Jewelry store in Tulsa. (R. 199) Upon such leased space he conducts eye examinations and issues prescriptions for glasses, which are generally filled by Douglas Optical at the same location. (R. 204, 217-219) Ellis Carp is also an officer in an Oklahoma corporation, Lee Optical of Oklahoma, Inc. (R. 205-206) This corporation maintains a store in Oklahoma City where lenses, frames and eye glasses are sold at retail. (R. 206) At both the Lee Optical store in Oklahoma City and the Douglas Optical department in Tulsa, glasses are dispensed and sold by means of duplicating lenses in the hands of patients without a prescription. (R. 206-207)

Trial of this case was had on October 26 and 27, 1953, before a three judge District Court. (R. 70-262) The written opinion of the District Court was filed March 1, 1954 (R. 36-68), and the judgment and decree of the District Court was filed March 29, 1954. (R. 27-29)

Under the judgment and decree of the District Court, the following portions of Section 2 of House Bill No. 953 were held unconstitutional and void, to-wit:

> "Those portions of Section 2 (Title 59, Chapter 24, Section 942), Oklahoma Statutes, which makes it unlawful for any person not a licensed optometrist or ophthamologist to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliance to the face of a person . . .

> or to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision . . . except upon written prescriptive authority of an Oklahoma licensed ophthamologist or optometrist." (R. 27-38)

Portions of Sections 3 and 4 of House Bill No. 953 were also declared unconstitutional and void. (R. 27-29) The ruling of the court and the questions presented on Sections 3 and 4 are not discussed in this amicus curiae brief.

The three general groups in the field of visual care in Oklahoma are the ophthamologist (physician), the optometrist and the optician. (R. 116, 158)

The ophthamologist is a duly licensed medical doctor or physician who specializes in the care of the eyes. He may also be referred to as an oculist. The general medical practitioner, although not specializing in the care of the eyes, may also examine and treat eye diseases or visual defects; this is particularly true in the smaller communities where the specialist is not available. (R. 72, 75, 90)

The optometrist is also a professional man who is educated and trained to examine the eyes for refractive error and at the same time to recognize but not treat diseases of the eyes. (R. 72) In the event that the optometrist detects evidence of some disease of the eyes while refracting or fitting glasses, the optometrist will refer the patient to the ophthamologist or physician for appropriate medical treatmennt. (R. 79)

The third group in the field of eye care is that of the optician who is engaged in the compounding, filling and adapting of prescriptions for eye glasses. This field is generally broken down into the optical supplier or wholesaler, who actually does the fabricating and grinding of the lenses, and the optical dispenser or retailer, who cuts, edges and mounts the lenses, furnished by the optical supplier, into frames and fits and adjusts the frames to the face of the patient. The patient or the public rarely deals directly with the optical supplier but may deal directly with the optical dispenser or dispensing optician. (R. 116-118)

The optometrist generally dispenses the prescriptions, the glasses which he prescribes; whereas the ophthamologist or physician generally issues his prescription to the patient to be taken by the patient to an optical dispenser. Much of the business of the retail optical dispenser is derived from the prescriptions issued by physicians. (R. 133, 158) The retail optical dispenser is to the ophthamologist as the pharmacist is to the general medical practitioner. (R. 97)

The testimony and depositions of individuals engaged in all three fields were introduced at the trial. Among many other matters, the testimony pertained to the reasons or necessity for requiring optical dispensers or opticians to have a written prescription from a physician or optometrist before they may dispense or supply glasses to the public.

There was testimony to the effect that improperly fitted eye glasses will not cause any permanent damage to the

organic structure of the eye, but that glasses which are misfitted will result in loss of efficiency, discomfort and other irritations. (R. 233-234)

By reason of education and training and under the provisions of the Oklahoma law, the only persons who are qualified to examine or refract the eyes and to issue prescriptions are the physicians and optometrists. (R. 103, 230, 324) Optical dispensers or opticians are not trained to examine the eyes for refractive error. (R. 103, 230) In the case of a patient desiring his initial pair of glasses, he must first consult with a physician or optometrist who will examine or refract his eyes and issue a prescription therefor. (R. 102)

In the event that a patient who has already been examined and fitted with glasses desires an additional pair of glasses or has broken his glasses and needs the same replaced, several courses of action are open. The patient may return to the physician or optometrist for a re-examination. If the patient is satisfied with his glasses, however, he may return to the optical dispenser, who will dispense or supply him with glasses upon his original prescription. The patient himself may possess the prescription, the optical dispenser may have the prescription on file if he originally sold the glasses, or else the patient or the dispenser may obtain the prescription by calling the physician for the same. In the event that the patient has lost his prescription and the optical dispenser does not have the same on file and it is inconvenient or undesirable to call the physician and obtain the same, the dispenser may duplicate the

lenses by the use of mechanical instruments, principally the lensometer. (R. 99) The lensometer is a mechanical device or instrument which measures the power of the existing lens and reduces it to prescriptive terms. (R. 124-126)

The District Court held that portion of the Oklahoma statute which forbids the optical dispenser or optician to fit, adjust or adapt lenses and frames to the face of a person and to duplicate or replace into the frames any lenses, except upon prescriptive authority of a licensed physician or optometrist, is unconstitutional and void.

SUMMARY OF ARGUMENT.

Section 2 of House Bill 953 (59 Okl. Statutes, Supp. 1953, Section 942; 59 Okl. St. Ann. Section 942), with which this amicus curiae brief is concerned, requires optical dispensers to have a written prescription from a physician or optometrist before supplying glasses to the public. The practice of the physician and optometrist being subject to state regulation under its police power in the interest of public health, safety, and welfare appears to not be in controversy.

House Bill No. 953 was designed to insure that citizens of Oklahoma shall receive best possible visual care through trained, qualified and licensed physicians and optometrists.

The State of Kansas strongly urges that the statute requiring a licensed physician's or optometrist's prescription to duplicate eye glass lenses is properly within the police power of the state and gives effect to the

licensing regulations previously enacted. Section 2 of House Bill No. 953 places the visual care of the people under the supervision and responsibility of qualified and licensed physicians and optometrists and does not deprive opticians of their right to pursue their calling or to perform their activities. This statute merely requires that they perform their activities pursuant to prescriptive authority of qualified and licensed professional men. The validity of the legislation with regard to dispensing or fitting of the initial pair of eye glasses does not appear to be questioned or disputed. Plaintiffs below seek an exemption allowing them to duplicate and dispense lenses without the necessity of obtaining a prescription.

The law is designed to protect the public health, welfare and safety and has a rational basis.

Since every presumption is indulged in favor of the validity of legislative acts, and since the practice of optometry is within the scope of the police powers of the state, the evidence in the case reveals sufficient facts upon which the legislature, on a rational basis, could properly enact the statutes in question. Although there may be debatable questions as to the reasonableness of the legislative regulation, this is not for the courts, but for the legislature which is entitled to form its own judgment.

The evidence revealed several reasons why duplication of eye glass lenses should be upon prescription rather than by obtaining necessary information through the use of a mechanical device only, such as, (a) vertex distance

may be shown by prescription; (b) correct axis of lense; (c) correct optical center of lense; (d) duplication by a mechanical device from an inadequate fragment of a lense may result in an incorrect lense; (e) dated prescription indicates time of last examination and may indicate need for another examination; (f) out of adjustment mechanical device will result in patient being supplied with incorrect lense; (g) element of human error in use of mechanical device; (h) repeated duplications from glasses alone may result in cumulative errors; (i) professional men prefer duplications from prescriptions.

These and other facts show reasonableness of the legislative requirements, and adequate reasons and a rational basis for their enactment. Thus, the actions and requirements of the legislature cannot be termed wholly illogical, arbitrary, capricious or unreasonable. Even though debatable, the legislature is entitled to its own judgment which should not be superseded by the views of the court.

Although there is a reasonable difference of opinion on the matter of duplication of eye glass lenses with or without a prescription, any doubt must be resolved in favor of the legislative judgment and the validity of the state law.

The Oklahoma legislature properly placed the care of the eyes under the supervision and responsibility of qualified and licensed professional men. This is a proper exercise of the state police power and the state law should be upheld.

ARGUMENT.

I.

PURPOSE OF LAW IS TO PLACE VISUAL CARE OF THE PUBLIC UNDER LICENSED AND QUALIFIED PROFESSIONAL PERSONS.

The Oklahoma statute considered in this amicus curiae brief regulates the sale of optical goods in Oklahoma. In general, Section 2 of House Bill No. 953 (59 O. S. Supp. 1953, Section 942; 59 Okl. St. Ann. Section 942) requires optical dispensers or opticians to have a written prescription from a physician or optometrist before they may supply glasses to the public. The District Court held that Section 2 was unconstitutional and void insofar as it would prohibit an optician from fitting, adapting or adjusting lenses, frames and eye glasses to the face by inserting old lenses into new frames and duplicating either lenses or complete eye glasses without a written prescription (or its duplicate) from a licensed physician or optometrist.

The basis for the District Court's decision as expressed in its opinion (R. 36) was that there was no real or rational relation between the public health and welfare and the provisions of Section 2 of House Bill No. 953. The opinion of the District Court is to the effect that Section 2 deprives the opticians of their right to freely pursue a lawful calling without a real and rational reason. The District Court held that the language of Section 2 made it unlawful for an optician to take old lenses and place them in new frames and then fit the completed spectacles to the face of the eye glass

wearer except upon written prescription. The court also held that the effect of Section 2 prohibits the duplication of existing lenses without a prescription.

Inasmuch as the court found that the optician could perform these particular services without the necessity of a written prescription, the court held the provisions of Section 2 to be unduly oppressive upon opticians without real or rational relation to the public health and welfare.

There appears to be no controversy about the practice of the physician or optometrist being subject to regulation by the state under its police power in the interest of public health, safety and welfare. The court acknowledged that the phase of visual care which deals with the actual examination of the eyes, whether for pathology or refraction, is clearly subject to legislative control. (R. 43)

The Oklahoma legislature had previously enacted statutes providing for the examination, registration and licensing of physicians authorizing such physicians to examine and refract eyes (Chapter 11, Title 59, Oklahoma Statutes 1951) The Oklahoma legislature had also previously enacted statutes providing for the examination, registration and licensing of optometrists (Chapter 13, Title 59, Oklahoma Statutes 1951). Recognizing the need for the protection of the public in the field of visual care, the Oklahoma legislature deemed it necessary to insure that only qualified and trained persons be permitted to examine eyes and prescribe glasses. The legislature, therefore, enacted the statutory provis-

ions relative to physicians and optometrists, which prescribes the qualifications, establishes the standards, and provides for licenses, whereby a person may be entitled to serve the public in examining eyes and prescribing glasses.

The purpose of House Bill No. 953 was to insure that the citizens of Oklahoma shall receive the best possible visual care through the efforts of well trained and qualified physicians and optometrists. As evidenced by the statute itself, it was deemed imperative by the Oklahoma legislature that the entire field of visual care be placed under the supervision of professional practitioners with all non-licensed artisans or interests, such as opticians, prohibited from activity except upon prescriptive authority.

Section 1 of House Bill No. 953 (59 O. S. Supp. 1953, Section 941; 59 Okl. St. Ann., Section 941) reads:

> "It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another."

The legislature rightfully and properly enacted statutes specifying who could examine eyes, fit glasses and write prescriptions. It would indeed be an anomaly in the law for the legislature to permit only licensed individuals to examine eyes, fit glasses, and write prescrip-

tions, while at the same time permitting lenses and glasses to be dispensed and sold to the public without the necessity of such prescriptions. The purpose of the statutes relative to registration and licensing of physicians and optometrists was to insure that the public received the proper and correct lenses for their ocular defects. Nothing is gained by requiring such licenses, if the lenses and glasses which the public requires can be obtained without the necessity of a prescription from those licensed. The provisions of House Bill No. 953 were therefore enacted to give full effect to the licensing requirements. The legislature insured that glasses were obtained only upon the prescriptions of duly licensed physicians or optometrists. The legislature desired to give effect to the licensing regulations by requiring that the lenses be dispensed or sold only upon the prescription of such persons who are duly licensed by law. The legislature properly placed the visual care of the people under the supervision and responsibility of qualified and licensed physicians and optometrists.

In furtherance of this public policy, Section 2 of House Bill No. 953 makes it unlawful for any person (optician) to fit lenses, frames or eye glasses to the face or to duplicate or place into frames any lenses prescribed for visual correction, except that they may be authorized to do so by a written prescription or its duplicate.

The Oklahoma statute does not deprive the opticians of their right to pursue their calling or to perform their activities. It merely requires that they perform their activities pursuant to prescriptive authority. The ques-

tion is whether the requirement of prescriptive authority has some real or rational basis for the protection of the public health, safety or welfare.

There appears to be no dispute as to the validity of this legislation with regard to the dispensing or fitting of the initial pair of eye glasses by the optician. The optician is not qualified, trained or licensed to examine and refract eyes. The examination and refraction of eyes, in order to determine the necessity for eye glasses and the proper correction for visual defects must be done by the licensed professional practitioner, either a physician or optometrist. In the instance of the initial pair of eye glasses, the optician must, of necessity, act pursuant to prescriptive authority.

In this action plaintiffs sought the right to replace or duplicate a lens without a prescription from a licensed optometrist or physician and to fit that duplicated lens as mounted in a frame to the individual.

The prohibitions contained in Section 2 of House Bill No. 953 against dispensing, fitting or replacing lenses and glasses without a prescription would include the initial lenses or glasses obtained by the individual as a result of an initial eye examination. In other words, before an individual can obtain his first lenses or pair of glasses, he must have an examination and a prescription by a licensed practitioner. There is no prohibition against having any number of eye glasses made up from one prescription. To obtain glasses having lenses with a different correction, there must be a subsequent examination and new prescription.

The plaintiffs below seek an exemption whereby they may duplicate lenses and dispense the duplicated lenses without the necessity of obtaining a prescription.

The acts which plaintiff below desires to do in violation of the Oklahoma law is contrary to the purpose and intent of the law, which is designed to protect the public health, welfare and safety and to place the visual care of the public under the supervision and responsibility of qualified and licensed professional persons.

II.

VISUAL CARE OF PUBLIC IS WITHIN POLICE POWER AND CONSTITUTIONALITY OF STATUTE IS PRESUMED UNLESS STATUTE IS CLEARLY ARBITRARY AND CAPRICIOUS.

We could not hope to make a more applicable statement pertaining to the statute in question than Mr. Justice Cardozo made in the case of Williams vs. Baltimore, 289 U. S. 36, 41, 77 L. ed. 1015, 1021, 53 Sup. Ct. Rep. 431, where he said:

> "Furtherance of the public good is written over the face of this statute from beginning to end as its animating motive."

In scrutinizing a statute attacked as unconstitutional, a presumption of constitutionality must be indulged. It is fundamental that no statute should be declared unconstitutional unless its infringement of the superior law is clear beyond substantial doubt. Every presumption is indulged in favor of the validity of legislative acts. If there is doubt as to the constitutionality of an act, such doubt is resolved in favor of its validity.

The regulation of the practice of optometry is within the police powers of the several states, and it is believed that plaintiffs below will not contend otherwise. McNaughton vs. Johnson, 242 U. S. 344, 61 L. ed. 352, 37 Sup. Ct. Rep. 178; Roschen vs. Ward, 279 U. S. 337, 73 L. ed. 722, 49 Sup. Ct. Rep. 336. As stated by the New Jersey Supreme Court in Abelson's vs. New Jersey State Board of Optometrists, 5 N. J. 412, 75 A. 2d 867, 22 ALR 2d 929:

> "Thus, by its very nature, the practice of optometry is subject to regulation for the protection of the public against ignorance and incapacity and deception and fraud, equally with the practice of ophthalmology and the other 'learned professions', a category originally confined to theology, law and medicine, but long since broadened in keeping with the diffusion of scientific learning and the need of specialized knowledge in the functioning of our ever-expanding and complex society. New Jersey State Board of Optometrists v. S. S. Kresge Co., 113 NJL 287, 174 A 353 (Sup. Ct. 1934), affirmed 115 NJL 495, 181 A. 152 (E. & A. 1935). The Legislature recognizes optometry as a profession calling for the exercise of scientific skill. One cannot qualify for the practice of the profession unless he has been graduated from an approved school or college of optometry with the degree of doctor of optometry. RS 45:12-1, 45:12-5, NJSA.
>
> "But in the final analysis, it is the nature of the subject matter and the end to be served that determine the quality and content of the regulatory power. The public health is a paramount concern of government. Apart from the protection of the individual against incapacity and fraud, the correction of visual deficiencies bears a direct relation to the public

safety and our general social and economic well being. The relationship is self-evident. The Legislature is invested with a broad discretion in the choice of means to serve this vital public interest, subject only to constitutional restraints and the rule of reason. If the measures invoked tend to serve a legitimate interest of society, the wisdom of the course taken is not ordinarily a justiciable question. When the subject lies within the police power of the State, 'debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment.' Sproles v. Binford, 286 US 374, 52 S. Ct. 581, 585, 76 L. Ed 1167 (1932). The range of the State's discretion in promoting the security and well being of the public 'accords with the subject of its exercise.' Sterling v. Constantin, 287 US 378, 53 S. Ct. 190, 195, 77 L. Ed 375 (1932). Where the end is one to which legislative power may properly be directed, it is enough 'if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end'. Stephenson v. Binford, 287 US 251, 53 S. Ct. 181, 187, 77 L. Ed. 288, 298, 87 ALR 721 (1932). In a word the State's exercise of the police power for the protection of a valid public interest is not subject to judicial interference if the means employed are fairly adapted to that end."

Thus, it is respectfully submitted that the right to regulate in this case has been determined as being within the police power of the State of Oklahoma. Therefore, debatable questions as to reasonableness are not for the courts, but for the legislature which is entitled to form its own judgment. The subject of optometry and the practice thereof being within the scope of the state's police power, the only limitation upon the exercise of

the power are that the regulations must have reference in fact to the welfare of society and must be fairly designed to protect the public against evils which might otherwise occur. Within these limitations, the legislature is the sole judge of the nature and extent of the measures necessary to accomplish its purpose. Since the subject of optometry concerns the public health, welfare and safety, the courts will not interfere with the judgment of the law making body unless such judgment is entirely devoid of a rational basis. It is respectfully submitted that the judicial inquiry should be restricted to the issue of whether any state of facts, either known or which could be reasonably assumed, affords support for the legislative action. Even though the character or effect of a statute and the reasons upon which it is based, be debatable, the legislature is entitled to its own judgment and its judgment will not be superseded by the views of the court. It is the contention of the State of Kansas as amicus curiae that the question for determination is not whether, in the judgment of the court, the reason on which the instant statutes are based are sound, but whether they are so plainly unsound that they may confidently be characterized as unreasonable and capricious. If the statute in question has been enacted upon a basis of evils that are not arbitrary, the extent thereof should not be measured against the estimate of the legislature. Also, if on the evidence in this case, there is room for a reasonable difference of opinion—and we submit that there is—as to whether lenses and eye glasses should be dispensed, fitted, replaced or sold except upon

a prescription of a licensed professional practitioner, the judgment of the legislature as expressed in the statute may not properly be superseded. Debatable questions as to reasonableness, wisdom and propriety, even upon medical matters concerning which there is a difference of opinion, are for legislative decisions. Even though the legislation may appear unwise or inexpedient, it remains the sole duty and responsibility of the lawmaking body. Collins vs. Texas, 223 U. S. 288, 297, 56 L. ed. 439, 445.

III.

THE EVIDENCE SHOWS SUFFICIENT AND SUBSTANTIAL REASONS FOR ENACTMENT OF SECTION 2 OF HOUSE BILL No. 953.

The record in this case contains sufficient evidence revealing various facts and reasons supporting the validity of the Oklahoma statute in question. Consideration of these facts or beliefs constitute an adequate reason and a rational basis for the enactment of Section 2 of the Oklahoma statute and for a holding that the same is valid. These facts undoubtedly prompted the Oklahoma legislature in the enactment of the statute. The witnesses included physicians, optometrists and opticians.

It was acknowledged without dispute that an examination and prescription must be had in the first instance before a pair of glasses may be dispensed by the optical dispenser. (R. 102, 103, 169, 231, 272, 352)

It is further acknowledged, without dispute, that the care of the public's eyes and vision should only be had

under the supervision and responsibility of licensed professional practitioners such as opthamologists or optometrists rather than by unlicensed persons even though they be skilled artisans. (R. 102, 107, 108, 169, 229, 230, 271, 273, 283, 292, 293, 294, 344, 345, 353, 354.)

The testimony disclosed a number of reasons why duplication of eye glasses should be made pursuant to a prescription of a physician or optometrist rather than by duplication from the lenses or fragments of broken lenses through the use of mechanical instruments by unlicensed and unprofessional individuals. The testimony in the case discloses that professional men including both physicians and optometrists, together with opticians, prefer to have duplications made from prescriptions rather than from glasses alone by use of such instruments as the lensometer. (R. 106, 107, 235, 250.)

Mechanical instruments such as the lensometer are only used to determine the original prescription in the absence of such prescription. This method is employed only when a prescription, for some reason, is not available. By requiring a prescription in the first instance, the legislature precluded the possibility of errors and mistakes which the optician can make by use of a mechanical instrument. Duplication from a prescription rather than from the glasses alone eliminates error that may result from an attempt to determine the prescription by the use of a lensometer reading. (R. 105, 106, 107, 169, 170, 235, 250.)

In order to duplicate a lense by mechanical methods only, there must be an adequate or sufficient fragment

or portion remaining. Without a prescription an optician may undertake to duplicate from an inadequate fragment and thereby furnish incorrect and improperly fitted lenses to the patient, whereas, the prescription itself would furnish all the correct data for grinding and adapting the lense. (R. 106, 142, 165, 251, 348)

In certain instances the prescription of the optometrist or physician needs to and does contain certain data or information regarding the vertex distance—the distance of the lense from the eye—and the angle of the lense to the eye that must be known in order to properly adapt the eye glasses to the patient. This information and data cannot be determined from the lenses or glasses alone. (R. 92, 103, 104, 228, 237, 312, 313)

Post-operative prescriptions such as prescriptions issued following cataract operations, contain necessary data and information for adapting glasses to the patient. This data and information cannot be ascertained from the glasses alone, but only from the prescription. (R. 339)

There is evidence to the effect that a lense may rotate or turn in its frame with the result that the axis of the lense will not be in proper position when placed before the eye. As a result, duplication obtained by a lensometer reading would not conform to the doctor's prescription for the axis position of the lense. On the other hand the prescription itself will indicate the correct axis of the lense. (R. 138, 139, 165, 166, 236, 237)

A prescription will also show the correct optical center of the lense. A lense which has rotated in the frame

and which is then duplicated by means of a lensometer may not conform to the prescription for the optical center of the lense. (R. 236, 237)

A mechanical device such as a lensometer may become out of adjustment resulting in incorrect readings. If this be the case, when duplications are being made by a lensometer, the patient would be supplied with an incorrect lense which would not conform to the original prescription. (R. 170, 235, 250, 251)

The element of human error in making lensometer readings is always present. Such human error in the course of a lensometer reading to obtain the power of the lense and duplicate the prescription, may cause an incorrect or improperly fitted lense to be furnished. (R. 125, 129, 140, 141, 169, 170, 236, 250, 251)

Each and all of the above mentioned matters concerning duplication of lenses are supported by testimony in this case. These reasons are sufficient and valid for requiring a prescription before duplicating lenses and fitting glasses. These reasons cannot be termed wholly illogical, arbitrary, capricious, or unreasonable. In the face of such reasons, supported by evidence, it cannot be said that there is no conceivable reason for a legislative act which requires that lenses be duplicated only upon a prescription of a licensed physician or optometrist.

It is not contended that the question is without possible dispute or difference of opinion. But, even though debatable, the legislature is entitled to its own judgment and such judgment should not be superseded by the views of the court. As stated by Mr. Chief Justice

Hughes in Sproles vs. Binford, 286 U. S. 374, 388, 389, 76 L. ed. 1167, 1179, 52 Sup. Ct. Rep. 581:

> "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the court, but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome."

It is respectfully submitted that the statute which prohibits duplication of eye glasses solely by the use of a mechanical instrument in the hands of an unlicensed person is not so entirely void of a rational basis that the court must interfere. The court should not concern itself with the wisdom of the legislative policy. Based upon the evidence in this case, there is, at least, a reasonable difference of opinion on the matter of duplication with or without a prescription. Any doubt must be resolved in favor of the legislative judgment and the validity of the act.

The rule is stated in Williams vs. Baltimore, 289 U. S. 36, 42, 77 L. ed. 1015, 1022, 53 Sup. Ct. Rep. 431 as follows:

> "The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way."

The following is found in the opinion in the case of Graves vs. Minnesota, 272 U. S. 425, 428, 71 L. ed. 331, 335, 47 Sup. Ct. Rep. 122:

"By enacting the present statute, the State has determined, through its legislative body, that to safeguard properly the public health, it is necessary that no one be licensed to practice dentistry who does not hold a diploma from a dental college of good standing. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273. And the case is to be considered in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest."

Taken as a whole, the several sections of the Oklahoma statute provide in substance that eye glasses shall only be dispensed and sold pursuant to the prescription of duly licensed physicians and optometrists. The Oklahoma legislature believed that the care of the eyes of the public should be entrusted to and be the responsibility of qualified, licensed professional men. Judicial support by this court in support of this proposition is found in the case of Roschen vs. Ward, Attorney General of the State of New York, 279 U. S. 337, 72 L. ed. 722. That case involved a New York law which made it unlawful to sell at retail any eye glasses or lenses for the correction of vision unless a duly licensed physician or optometrist was in charge and in personal attendance where such articles were sold. This Court upheld the New York law as a valid enactment under the police power of the state.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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Nos. 184 & 185

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL, APPELLANTS

v. No. 184

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS, RESPONDENTS

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS, APPELLANTS

v. No. 185

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA; ET AL, RESPONDENTS

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF ARKANSAS

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INDEX

Page

STATEMENT 1

ARKANSAS STATUTORY PROVISION 2

OKLAHOMA STATUTORY PROVISION 4

ARGUMENT:

1. There is a Real and Substantial Relation between § 2 of the Oklahoma Act and the Promotion of the Public Health 7

2. The Prohibition of § 3 of the Oklahoma Act Tends to Prevent Fraud and Over Reaching of the Public and is Thus a Permissible Police Regulation 15

3. The Provision of § 4 of the Oklahoma Act against Providing Space in a Merchandising Establishment to Person who Practices Optometry is not Unconstitutional Merely Because of its Novelty 17

CONCLUSION 19

INDEX (Continued)

Cases Cited

	Page
Breard *v.* Alexandria, 341 U.S. 622	14
Dellinger *v.* Ark. State Board of Optometry, 241 Ark. 562, 217 S.W. 2d 338	11
Dickson *v.* Flynn, 246 App. Div. 341, 286 N.Y.S. 225	11
Great Atl. & Pac. Tea Co. *v.* Grosjean, 304 U.S. 42	14
Melton *v.* Carter, 204 Ark. 595, 169 S.W. 2d 425	2,8,9,17
New Jersey State Board of Optometrists, 113 N.J.L. 87, 174 A 353 (Sup. Ct.)	11
Noble State Bank *v.* Haskell, 219 U.S. 104	18
Pierce Oil Corp. *v.* Hope, 248 U.S. 498	14
Semler *v.* Oregon State Board of Dental Examiners, 294 U.S. 608	15
Sproles *v.* Binford, 286 U.S. 374	7,17
State *v.* Rones, 223 La. 839	16
Stephenson *v.* Binford, 287 U.S. 251	7,17
Sterling *v.* Constantin, 287 U.S. 378	7

Statutes

Act 94, Ark. Acts of 1941	2
59 Okla. St. Ann. §§ 941-947	1

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MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; ET AL ..... *Respondents*

STATEMENT

The Attorney General of Arkansas appears as amicus curiae in this case (Rule 42 (4)) to protect the health of the people of Arkansas, and for this purpose he aligns himself with the Attorney General of Oklahoma in his appeal from the decision of the United States District Court for the Western District of Oklahoma holding invalid certain portions of the Oklahoma Act Relating to Visual Care, 59 Okla. St. Ann. §§ 941-947 (hereinafter termed the Oklahoma Act), as violative of the Fourteenth Amendment to the United States Constitution, 120 F. Supp. 128. The Attorney General of Arkansas believes that the decision is erroneous and fraught with danger to the health, not only of the people of Oklahoma, but of the people of Arkansas as well.

The law of Arkansas regulating the practice of optometry, Act 94, Ark. Acts of 1941, contains provisions substantially similar to Sections 2 and 3 of the Oklahoma Act. The Supreme Court of Arkansas has held the Arkansas law constitutional. *Melton* v. *Carter*, 204 Ark. 595, 169 S.W. 2d 425. If this Court approves the decision of the District Court in the case at bar, the result will be to imperil the pertinent Arkansas provisions.

The Arkansas Optometry Practice Act provides, in relevant part:

> Section 1. The practice of Optometry is hereby declared to be a *learned profession*, and the same rights, powers and duties are hereby declared to attach thereto as attach to other learned professions.
>
> The profession and the practice of Optometry is hereby defined to be the employment of any method or means other than the use of drugs, medicine, or surgery for the analysis of any optical defect, deficiency or deformity, visual or muscular anomaly of the visual functions, or the use of scientific instruments to train the visual system.
>
> Any person, who by any method or means other than the use of drugs, medicine or surgery analyzes or determines any optical defect, deficiency or deformity, or visual or muscular anomaly of the visual system, or who prescribes, dispenses, adapts, or duplicates lenses, prisms or ocular exercises for the correction, relief or aid of the visual function, or holds himself out as being able to do so shall be deemed to be engaged in the practice of Optometry.

Section 12. The following acts are hereby declared to be unlawful acts:

> (1) The violation of any of the foregoing provisions of this Act . . . (2) for any Optometrist, physician, or surgeon to advertise in any manner either directly or indirectly, any fraudulent, false

or misleading statement as to the skill or method of practice of himself or of any other Optometrist, physician or surgeon, or to advertise in any manner that will tend to deceive, mislead, or defraud the public, (3) for any person, firm, or corporation or any Optometrist, physician, or surgeon to advertise either directly or indirectly free optometric service or examination or to advertise directly or indirectly by any means whatsoever any definite or indefinite amount or terms as a fee for the professional services or materials rendered or furnished by an Optometrist, physician or surgeon, (4) for any person, firm or corporation or partnership not having a license to engage in the practice of optometry, (5) for any person, firm, or corporation to employ any optometrist, physician or surgeon to assist it in the unlawful practice of optometry, provided however, a licensed Optometrist, or partnership composed of licensed Optometrists may employ other licensed Optometrists in practicing optometry, (6) for any Optometrist, physician or surgeon to accept employment from an unlicensed person, firm or corporation or in any other manner to assist it or them in the unlawful practice of optometry, (7) for any person, firm, or corporation to give to any person eyeglasses, spectacles or lenses as a premium or inducement for the purchase of any goods, wares or merchandise, (8) for any person to impersonate a registered optometrist, or to buy, sell or fraudulently obtain a certificate of registration, and (9) for any unlicensed person, or any firm or corporation to publicly represent that he or it by himself or itself, or thru agents or employees is engaging in the practice of optometry or is qualified to do so.

Section 16. Nothing in this Act except as expressly provided otherwise herein shall apply to physicians and surgeons, nor to persons who sell eyeglasses, spectacles, or lenses at wholesale on prescriptions from optometrists, physicians, and surgeons, nor shall it prohibit the sale of ready-made glasses and spectacles when sold as merchandise at

established places of business, where no attempt is made to practice optometry.

The Oklahoma Act provides, in relevant part:

> Section 2. It [is] unlawful for any person . . . not licensed [to do so] to fit, adjust, adapt or in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or to hold himself out to the public as being qualified to do any of the acts listed . . ., except that persons licensed . . . may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith many measure, adapt, fit, prepare, dispense or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses.
>
> Section 3. It [is] unlawful for any person . . . to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms or other optical appli-

ances for visual correction . . . Nothing in this act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sun-glasses equipped with plano lenses nor with industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

Section 4. It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction, to receive or accept any rebate, kickback, reward or premium from any optical company or any other person, firm or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any person licensed. . . .

It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization group or lay person and it shall be likewise unlawful for any corporation, lay body, organization, group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of a person licensed. . .

No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store.

The portions of the foregoing Sections 2, 3 and 4 which the District Court found to be unconstitutional are as follows:

> (1) Those portions of Section 2 which make it unlawful for any person not licensed to do so "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person. . ., or to duplicate or attempt to duplicate or to place or replace into the frames any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision . . ., except [upon written prescription of a licensed person]".
>
> (2) That portion of Section 3 which makes it unlawful "to solicit the sale of . . . frames, mountings, . . . or other optical appliances for visual correction".
>
> (3) That portion of Section 4 which provides that "No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store.

The essential similarity between the invalidated portions of Sections 2 and 3 of the Oklahoma Act to certain provisions of Sections 1, 12 and 16 of the Arkansas Optometry Practice Act is apparent.

ARGUMENT

I

There Is a Real and Substantial Relation Between the Pertinent Portions of Section 2 of the Oklahoma Act and the Promotion of the Public Health

In determining the constitutionality of an act of the legislature of a state relating to the health of its people, this Court is committed to the doctrine that when the subject lies within the state police power, "debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment". *Sproles* v. *Binford*, 286 U.S. 374. The range of the state's discretion in promoting the security and wellbeing of the public "accords with the subject of its exercise". *Sterling* v. *Constantin*, 287 U.S. 378. Where the end is one to which legislative power may be directed, it is enough "if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end". *Stephenson* v. *Binford*, 287 U.S. 251. In a word, the state's exercise of the police power for the protection of a valid public interest is not subject to judicial interference if the means employed are fairly adapted to that end. Thus if Section 2 of the Oklahoma Act bears "in any degree, or under any reasonably conceivable circumstances", an actual relation to the public health, it is valid under the Fourteenth Amendment to the United States Constitution as an exercise of the state's police power. In enunciating the rule that "debatable questions as to reasonableness are not for the courts but for the legislature", *Sproles* v. *Binford*, *supra*, this Court has already decided the case at bar. The question of the reasonableness of Section 2 of the Oklahoma Act is at the

very least "debatable". For example, one part of the section makes it unlawful for an unlicensed person to "fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person. . .". Section 1 of the Arkansas Optometry Practice Act provides punishment for any unlicensed person who ". . . dispenses, adapts, duplicates lenses, prisms . . . for the correction, relief or aid of the visual function. . .".

The Arkansas provision was attacked on the same ground which was here made the basis of attack, but was upheld and unanimously declared to be constitutional in all respects by the Supreme Court of Arkansas in *Melton* v. *Carter*, 204 Ark. 595, 164 S.W. 2d 425.

In that case, the quoted section was challenged on the ground that "optometry, not being comparable to law, medicine, or theology, is not a learned profession, being limited in its character because those engaged in the practice do not have the background, training, and education characterizing the three professions mentioned". It was further argued that "dispensing eye glasses is a commercial transaction, involving only such knowledge as is necessary to fill prescriptions written by optometrists or oculists".

In this connection, the Arkansas Court said, "In framing [the policy expressed in the act] the Legislature was not bound to provide for determination of the relative proficiency of particular practitioners. The Legislature was entitled to consider the general effect of the practices which it described, and if these effects were injurious . . . to counteract them. . ." "If optometry were a business rather than a profession requiring a high degree of skill and knowledge, the rights of appellees would be property. . ." "The challenged Act has for its purpose (or at

least the general assembly so found) the protection of those who *might* be . . . imposed upon by the unscrupulous practitioner." "But, believing as we do that no constitutional right has been invaded—although the legislative policy may be questioned by those who oppose the measure —we have no recourse but to say that the Act is valid, . . ." *Melton* v. *Carter, supra, passim.* If the highest judicial tribunal of the State of Arkansas believed that it had "no recourse but to say that the Act is valid", when considering a provision to all intents and purposes identical with Section 2 of the Oklahoma Act, how can it be said that the question presented here is not a fairly "debatable question" which is within the exclusive province of legislative judgment.

Optometry has been declared to be a learned profession by the Legislature of Arkansas, and this declaration was judicially sanctioned in *Melton* v. *Carter, supra.* If the practice of optometry is a learned profession in Arkansas, it is a learned profession in Oklahoma.

> Optometry is not a mere trade or craft. It is an applied branch of the science of physiological optics, directed to the improvement of visual acuity through the correction of refractive errors. It is concerned with the phenomena of light reflection and refraction. Optics is the science which treats of the nature and properties of light and vision; ocular refraction consists of the adaptation and accommodation of the light rays which enter the eye in keeping with optical principles, to secure proper focus and the formation of an accurate image on the retina. Optometry is directed to the measurement of the range of vision and the correction, by lens, of visual defects and the increase of visual power with a minimum of eye exertion. Thus, the practice of optometry calls for scientific knowledge and skill in the use of refractive media. Want of knowledge of the scientific principles and of the

mechanism of accommodation and loose practice are fraught with such danger to the delicate and vital organ of sight as to warrant strict regulation of the calling in the interest of health and safety; and, to that end, the State may adopt measures to insure technical knowledge and skill and proscribe practices and procedure that may be unexceptionable in the market place but do not comport with the standards of professional behavior commonly accepted today as essential to the practice of the healing art and its kindred pursuits relating to an anatomical and physical function. While not an oculist or an ophthalmologist, an optometrist is not a tradesman, or craftsman, but a practitioner in a specialized field of physical science intimately identified with the public health, even though he is not trained in pathology. The practice of optometry involves, not alone the measurement of the powers of vision, but also diagnosis and prescription for the revealed ocular deficiency or deformity or visual or muscular anomaly of the eye; and this calls for scientific knowledge of the anatomy of the eye and the principles of physical optics, the area of physics relating to the direction, reflection and refraction of light. The statutory definition of optometry coincides with the technical sense of the term. It consists of 'the employment of objective or subjective means, or both, for the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its powers of vision and adapting lenses or prisms for the aid thereof'. * * * *

Thus, by its very nature, the practice of optometry is subject to regulation for the protection of the public against ignorance and incapacity and deception and fraud, equally with the practice of ophthalmology and the other 'learned professions', a category originally confined to theology, law and medicine, but long since broadened in keeping with the diffusion of scientific learning and the need of specialized knowledge in the functioning of our ever-

expanding and complex society. *New Jersey State Board of Optometrists* v. *S. S. Kresge Co.*, 115 NJL 287, 174 A 353 (Sup Ct.).

> But in the final analysis, it is the nature of the subject matter and the end to be served that determine the quality and content of the regulatory power. The public health is a paramount concern of government. Apart from the protection of the individual against incapacity and fraud, the correction of visual deficiencies bear a direct relation to the public safety and our general social and economic well being. The relationship is self-evident. The Legislature is invested with a broad discretion in the choice of means to serve this vital public interest, subject only to constitutional restraints and the rule of reason. If the measures invoked tend to serve a legitimate interest of society, the wisdom of the course taken is not ordinarily a justiciable question.

It is certainly a matter within the competency of the legislature to determine that all the matters contemplated by both Section 2 of the Oklahoma Act and Section 1 of the Arkansas Optometry Practice Act should be for the purposes therein expressed, considered as the practice of optometry, or regulable as such and prohibited to any except certain licensed persons. That this is within the proper power of the legislature is clearly recognized in *Dickson* v. *Flynn*, 246 App. Div. 341, 286 N.Y.S. 225; *Dellinger* v. *Ark. State Board of Optometry*, 214 Ark. 562, 217 S.W. 2d 338.

The record in this case is replete with facts which might well form the basis of such a legislative determination. The Court's attention is called to the following:

1. Sometimes prescriptions need to and do contain data regarding the desired distance of the lens from the eyes, and the angle of the lens to the eyes that should be followed in adapting glasses to the patient and which cannot be ascertained

from the glasses alone (Dr. Coston, R. 92, 103, 104; Dr. Clay, R. 228, 237; Dr. Benedict, R. 312, 313).

2. Post-operative prescriptions contain necessary information for adapting glasses to the patient which cannot be ascertained from the glasses alone (Dr. Braley, R. 339).

3. Duplication from prescription rather than glasses alone eliminates error that may result from lensometer reading (Dr. Coston, R. 105, 106, 107; Mr. Barber, R. 169, 170; Dr. Clay, R. 235; Dr. Stackpole, R. 250).

4. Prescription will show correct axis of lens whereas lens may have rotated in the frame and resulting lensometer reading would not conform to doctor's prescription for the axis (Mr. Hill, R. 138, 139; Mr. Barber, R. 165, 166; Dr. Clay, R. 236, 237).

5. Prescription will show correct optical center of lens whereas lens may have rotated in frame and resulting lensometer reading would not conform to doctor's prescription for the optical center (Dr. Clay, R. 236, 237).

6. Optician may undertake to duplicate from an inadequate fragment and furnish incorrect lens to patient, whereas prescription would give correct data for grinding and adapting (Dr. Coston, R. 106; Mr. Hill, R. 142; Mr. Barber, R. 165; Dr. Stackpole, R. 251; Dr. Braley, R. 348).

7. Prescription will indicate correct date of last eye examination and may suggest need for re-examination due to lapse of time (Dr. Coston, R. 109).

8. Lensometer can get out of adjustment, resulting in incorrect reading with patient being supplied with incorrect lens (Mr. Barber, R. 170; Dr. Clay, R. 235; Dr. Stackpole, R. 250, 251).

9. The element of human error in making lensometer reading is always present and may cause incor-

rect lens to be furnished the patient. This was clearly demonstrated in the court room by the respondents' witness, Hill, a dispensing optician, who misread the axis of the right lens of Dr. Duvall's glasses on the lensometer by five degrees (Mr. Hill, R. 125, 129, 140, 141; Mr. Barber, R. 169, 170; Dr. Clay, R. 236; Dr. Stackpole, R. 250, 251).

10. Repeated duplications from glasses alone, each within acceptable tolerance, could result in lens being furnished the patient which fail to correspond to doctor's original prescription (Dr. Coston, R. 106; Mr. Hill, R. 139; Mr. Barber, R. 170).

11. Professional men prefer duplications from prescriptions over duplications from glasses alone (Dr. Coston, R. 106, 107; Dr. Clay, R. 235; Dr. Stackpole, R. 250).

In view of the foregoing facts, it is difficult to understand how the District Court could find that "It is absolutely unnecessary to delegate to professional men the control of and responsibility for [the acts described in Section 2 of the Oklahoma Act]," 120 F. Supp. at 137, and that "the legislature has been guilty of undue oppression in failing to set up qualifying standards for the opticians if such standards be necessary for the public protection, and at the same time arbitrarily legislating many of the skilled artisans out of a long recognized trade, by delegating the sole control of their skills and business to a professional group, when the public can be completely protected without taking from the optician this valuable property right". 120 F. Supp. at 137. These statements characterize the opinion of the District Court. The opinion fails to take into account several factors. It ignores the eleven foregoing points of fact which, by themselves, are enough to supply a reasonable basis for the regulation involved. It ignores the fact that the right to pursue an occupation is

not absolute and static but may be expanded or contracted in the interest of the public health with the advancement of scientific knowledge and method. No doubt, at one time, it was thought that the right of the village barber to perform surgery was an indefeasible right. Today the notion is ridiculous.

As it was held in *Pierce Oil Corp.* v. *Hope*, 248 U.S. 498, a business once lawful may later, because of a changed situation, become a menace to the public health and be required to yield to the public good. It is familiar law that in the exercise of its police power a state may absolutely forbid as inimical to the public good the prosecution of a particular type of business. *Great Atl. & Pac. Tea Co.* v. *Grosjean*, 301 U.S. 412.

The opinion also ignores the fact that the states, under the federal system of government, have the widest discretion to determine as a matter of fact what means shall be employed to protect and promote the public health. It is evident that the legislature of Oklahoma deemed it expedient to entrust the acts involved, not to artisans or tradesmen restrained only by the morals of the market place, but to professional men restrained by a professional code of ethics and subject to strict police regulation. The optician has no right paramount to that of the general public, and it does not suffice to say that a police regulation cannot stand merely because it is economically inconvenient, or even disastrous, to the business of the optician, if in the judgment of the legislature it bears some reasonable relation to the public health. cf. *Breard* v. *Alexandria*, 341 U.S. 622.

II

The Prohibition of Section 3 of the Oklahoma Act Upon Soliciting the Sale of Frames, Mountings, or Other Optical Appliances for Visual Correction Tends to Prevent Fraud and Over-Reaching of the Public and to Promote the Public Health; Therefore, It Is a Permissible Police Regulation

The evils sought to be remedied by Section 3 of the Oklahoma Act are in no important respects different from the evils aimed at in the law prohibiting advertising in the field of dentistry upheld in the case of *Semler* v. *Oregon Board of Dental Examiners*, 294 U.S. 608. The statute involved there prohibited advertising or soliciting for dental work or advertising by means of representations of a tooth, teeth, bridge work or any portion of the human head. In considering the validity of the law, this Court said:

> We do not doubt the authority of the state to estimate the baleful effects of such methods and to put a stop to them. The Legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous.

This Court also remarked that the Oregon law was within the power of the state as a measure to prevent "luring the credulous and ignorant members of the public . . . for the purpose of fleecing them".

It is a matter of common knowledge that members of the public generally do not distinguish between ophthalmologists, oculists, optometrists and opticians. It is at least conceivable that the public might be deceived by the advertisements of opticians to believe that they are qualified to render services in addition to supplying frames and duplicate lenses which such opticians are not qualified or licensed to perform. The fact that such fraud and deception does occur and is aided by such advertising is the very reason for the enactment of such laws. If advertising of this sort is eradicated, it is obvious that its evil effects will in some measure be precluded.

The power of the state to regulate or restrict advertising of a commercial business dealing in optical goods has many times been upheld. See *State* v. *Rones*, 223 La. 839, 67 So. 2d 99, and as it was said by Circuit Judge Murrah in his dissenting opinion in this case,

> [there is] no doubt of the power of the legislature to regulate the advertising of the empty frames, mountings, and prisms and other optical devices if the object of such legislation is the prevention of fraud or mistake or to protect the public against deceptive practices in the broad field of visual care * * *. Considered in isolation, an eye glass frame or mounting is no more than a mere piece of merchandise. But considered in the context of the total field of visual care, it takes on a significant relationship to the visual needs of the public and ceases to be a mere piece of merchandise to be dealt with in the market place on an arm's length basis. 120 F. Supp. at 145.

Section 12 of the Arkansas Optometry Practice Act, in its total effect, contains proscriptions of the same acts which are prohibited by Section 3 of the Oklahoma Act. These prohibitions were held to be constitutional in *Melton* v. *Carter, supra.* When the same general type of provisions have been deemed constitutional by the Supreme Court of Arkansas, and when one of the judges of the United States District Court for the Western District of Oklahoma found a reasonable connection between the questioned provisions of the Oklahoma Act and the evils sought to be remedied, how can it be seriously urged that the question of reasonableness in the premises not one which is open to a difference of opinion (or is "debatable") which is a subject not properly within the purview of the courts, but is, instead, a subject exclusively within the province of legislative judgment. *Sproles* v. *Binford, supra.* Certainly, on this score there "can be seen that in [some] degree, or under [some] reasonably conceivable circumstances, there is an actual relation between the means and the end". *Stephenson* v. *Binford, supra.*

III

The Legislative Injunction of Section 4 of the Oklahoma Act Against Providing Space in a Merchandising Establishment to Persons Who Practice Optometry Is Not Unconstitutional Merely Because It Is Novel

Undoubtedly there can be found in the law of every state in the union provisions intended to prevent the corporate practice of the learned professions. The law reports abound with cases on the subject. The ingenuity which the corporate system is able to command, because of the wealth it commands, has made it a difficult task, to say the least, for the states to close the gap against the practice of such professions by corporations. Apparently the legislature of Oklahoma felt that the time had come

for it to exercise a measure of ingenuity in behalf of the people whose health it is the legislature's duty to protect. But the method which it employed is nonetheless valid.

It may be that many ethical persons will be subjected to inconvenience by the terms of the pertinent part of Section 4 of the Oklahoma Act. However, it is easy to see how, in the long run, the best interests of the public in general will be served by such a provision. For, as a practical matter, it is unlikely, so long as the practice of optometry and the art of visual care are permitted to share the same bed with mercantilism, that the vice, which it is the policy of the law to prevent, can be eradicated. The situation is poignantly analyzed by Circuit Judge Murrah in his dissenting opinion, 129 F. Supp. at 146.

In this connection, nothing is more appropriate than the words of Mr. Justice Holmes in *Noble State Bank* v. *Haskell*, 219 U.S. 104, 110:

> We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *naturam naturae* as against the lawmaking power.

CONCLUSION

In view of the foregoing, it is believed that the decision of the United States District Court for the Western District of Oklahoma declaring Sections 2, 3 and 4 of the Oklahoma Act unconstitutional is erroneous; that its affirmance by this Court would seriously endanger the health of the people not only of Oklahoma but also of the State of Arkansas, and perhaps the people of other states; that the law in question should be approved by this Court for the protection of the public; and, that, therefore, the decision of the District Court should be reversed.

Respectfully submitted,

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Supreme Court of the United States

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Respondents.

No. 185

AMICUS CURIAE BRIEF OF J. P. COLEMAN, ATTORNEY GENERAL OF MISSISSIPPI

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INDEX

	PAGE
I. Interest of Amicus Curiae	2
II. Summary of Argument	2
Argument and Authorities	3
General Statement	3
Authority:	
Busch Jewelry Co. et al. v. State Board of Optometry (Miss.), 62 So. 2d 770	30
Busch Jewelry Co. et al. v. State Board of Optometry, 74 S. Ct. 34	4, 33
Capitol Optical Co. et al. v. State Board of Optometry, (Miss.), 70 So. 2d 15	33
Martin v. Baldy, 249 Pa. 253, 94 A. 1091	10
Sears Roebuck & Co. et al. v. State Board of Optometry (Miss.), 57 So. 2d 726	12
Conclusion	36

Supreme Court of the United States

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANVILLE SCANLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma, ET AL.,

Appellants,

VERSUS

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I

INTEREST OF AMICUS CURIAE

The Attorney General of Mississippi joins the Attorney General of Oklahoma in urging the constitutionality of House Bill 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 13, Title 59, page 271, Oklahoma Session Laws 1953; 59 Okl. St. Ann. § § 941-947), relating to visual care because the questions presented for determination vitally affect the public health and welfare of the people of Mississippi. Notwithstanding several adverse decisions by the Supreme Court of Mississippi, some of those identified and interested as plaintiffs in the court below, recently came into and are now operating in Mississippi.

II

SUMMARY OF ARGUMENT

The Attorney General of Mississippi, on behalf of the State of Mississippi, urges, with the utmost vigor, that the furnishing of corrective eyeglasses to the public involves the public health and welfare and that all provisions of House Bill 953, as enacted by the Oklahoma Legislature, were in the valid exercise of the police power

of the State. That all sections are valid enactments under the police power of the State of Oklahoma in the interest of the public health and welfare under principles of law announced by this Court and many state courts, as shown by the citations in the brief of the Attorney General of Oklahoma which are adopted herein by reference.

We further urge that the prohibition against leasing space in a retail merchandising store to one purporting to do eye examinations is a valid exercise of the police power by the State of Oklahoma and closes an avenue by which those who would commercialize the professions dedicated to the protection and preservation of the eyesight of the people of this country, could engage in the practice of these professions unlawfully and to the detriment of the public health and welfare as three times held by the Supreme Court of Mississippi.

ARGUMENT AND AUTHORITIES

GENERAL STATEMENT

While the Attorney General of Mississippi joins the Attorney General of Oklahoma in urging favorable consideration, by this Court, of all three propositions presented in his brief on behalf of appellants and joins in his request for relief as respondents, we will not burden the Court with further citations and argument on Propositions I and II as they are well presented and argued. This brief will be, therefore, generally in support of

Propositions I and II and more particularly in support of Proposition III because, in the past three years, the Mississippi Supreme Court has been called upon, in three separate cases, by three separate companies, to approve and condone corporate practice by permitting a corporation to employ a physician or optometrist, or lease them space in their store, for the purpose of examining eyes to further sales of eyeglasses by the corporation, and each time the Mississippi Supreme Court has condemned such practice as detrimental to the public health and welfare of the people of Mississippi. In one of these cases *certiorari* to this Honorable Court was denied on October 12, 1953 (*Busch Jewelry Company, a Corporation*, and *Dr. F. M. Dooley* v. *the State Board of Optometry*, 74 S. Ct. 34).

We believe it will be helpful, in passing on the questions presented in these appeals, to give something of the historical growth and development of the profession of optometry in the visual care field.

Next to life itself, God's most precious gift is sight. To the care of this great gift of vision the profession of optometry has sincerely and faithfully dedicated its services.

The optometrist specializes in the examination of the eyes and in the protection and improvement of vision. He makes a complete visual analysis to determine the visual efficiency at distance and at near. When visual inef-

ficiencies are found he prescribes and provides any lenses or visual training needed for comfortable and efficient seeing.

The optometrist does not treat eye conditions requiring medicine or surgery. He is trained to detect and recognize diseases in the eye, and when present, he refers the patient for other professional care. Ophthalmologists and oculists are physicians who specialize in the medical and surgical care of the eyes. An optician fills prescriptions for glasses. He serves the optometrist, ophthalmologist, and oculist in the same manner as a pharmacist serves the physician.

The present-day optometrist obtains a highly specialized college education of four years or more. He must graduate from one of the nine schools of optometry accredited by the Council on Education and Professional Guidance of the American Optometric Association. The average tuition cost of an optometric education is approximately $2,000.00 (not including board and lodging).

The optometrist is thoroughly trained in biology, chemistry, bacteriology, human anatomy, physiology, physiologic optics, general pathology, ocular pathology, physics, mathematics, geometrical optics, mechanical optics, theoretical optometry, practical optometry, analytical analysis, psychology, psychology of vision, visual training, perimetry, and contact lenses. He is also trained

in the fields of industrial vision, vision for school children and in subnormal vision (telescopic lenses).

Upon graduation and before obtaining a license to practice, the optometrist must pass a comprehensive examination given by the State Board of Optometry in the state in which he expects to practice. State board examinations are required in every state of the union and in the District of Columbia.

The roots of the profession of optometry are deeply imbedded in over 2,000 years of scientific achievement. A list of the contributions of modern-day optometry would include most of the great men who have made scientific history.

For purposes of brevity the history of optometry is usually traced from the early mathematicians, physicians, and astronomers. Kepler (1571-1630) discovered that the human eye has a "yellow spot" which enables it to see detail; that farsighted people are helped by convex lenses, but that nearsighted people require concave lenses. Sir Isaac Newton (1642-1727) expounded the mathematical laws of light. Until the early 19th century progress in visual care was slow because knowledge of eye structure and optical abnormalities were lacking. Old-age farsightedness and nearsightedness were the only visual deficiencies corrected. In 1784 Benjamin Franklin invented bifocal spectacles.

In 1801 a physicist, Sir Thomas Young, detected and described astigmatism. Sir George Airy, an astrono-

mer, succeeded in 1827 in correcting astigmatism with a cylinderical lense. Other great men who added to the fundamental structure of optical science include Galileo, Scheiner, Snell, Huygens, Descartes, Barrow, Leeuwenhoek, Hall, Dollond, Snellen, Gauss, Helmholtz, Prentice and many others.

In the decade from 1850 to 1860 Abbe developed a system of uniform curves and introduced a formula for controlling the density of glass. The development of optometry went for the most part, hand in hand with the progress of lenses and optical instruments, and the history of optometry is so interwoven with these inventions that it is not possible to separate them.

It was in the United States that the merger of all these ideas, theories and inventions took place. Out of this accumulated knowledge and background the profession of optometry slowly evolved. As early as 1783 in America spectacles were sold in shops as merchandise. They were so expensive that the ordinary person could not afford them until a lense-grinding machine was invented to replace the costly hand-grinding. A variety of lenses in different frames was available and the patient tried them on until he found one through which he could see best. After a while these glasses were classified according to their focal strength. Later an assortment of lenses of various strengths was arranged so that they could fit in a trial frame on the patient's face. This was the crude

beginning of refraction (eye examination to determine necessary corrective lenses).

The next step occurred when the men who sold these glasses began to help people in the selection of lenses which would give them the clearest vision. These men became known as sight testing opticians. Many of these men became so seriously interested in the problems they encountered in trying to help others to see better that they did study and research in the fields of optics and the correction of human vision. In 1900 a group of them banded together and formed the American Optical Association. In 1903 they adopted a new and more exact name, the American Optometric Association, and designated themselves as optometrists.

Up to 1900 there were no laws regulating the prescription of glasses, and as the industrial and cultural development of the nation brought about a great demand for lenses, many unqualified people took advantage of this situation. In 1901 Minnesota was the first state to license and regulate the practice of optometry by law. In 1924 all the states, territories, and possessions of the United States had passed optometry laws. Optometry is also now regulated by law in Canada and some foreign countries.

Following the formation of the American Optometric Association in 1903, the various states and territories of the United States set up their own optometric

associations—all affiliated with the American Optometric Association. Later the American Optometric Foundation was formed. This foundation is an instrument of the American Optometric Association—receiving grants, carrying on research, providing student aid and scholarships, and promoting professional advancement. Through the years since 1903 it has been the policy of the American Optometric Association to share with every optometrist, ophthalomogist, and oculist the latest and most advanced knowledge resulting from experience and research.

Although the profession of optometry is rooted in antiquity, its modern development has taken place in the last 50 years. The growth of optometry has been phenomenal. Never before has a major profession developed and achieved public acceptance in so short a life span. Today there are over 16,000 optometrists in the United States. They are doing more than 75% of all the eye examinations, lens prescriptions, and visual training.

And so from a very humble origin a great new profession was born. Present day examination of the eyes by optometrists is divided into more than twenty-five tests. These tests range from simple visual acuity measurements, for which there are no less than six different types of apparatus, up to precision measurement of corneal curvature, lens defects, accommodative amplitude, muscular balance or imbalance, stereoscopic faculty, light

sensitivity of the retina, extent of visual fields, and the determination of the amount of illumination necessary for various tasks.

"The examination of eyes and the prescribing of glasses by optometrists goes back to ancient time. In the case of *Martin* v. *Baldy* (1915), 249 Pa. 253, 94 A. 1091, the Supreme Court of Pennsylvania has the following to say about optometry: 'It appears from the proofs that the business of or profession of optometry is one of ancient standing. Until a comparatively recent date, a large part of that which is done by optometrists was exclusively within their province, and was not covered in practice by the efforts of the physician or surgeon. Within the last quarter of a century or thereabouts, it appears from the proofs that among those who are engaged in the making of lenses to correct or cure defects in eyes, there has arisen a classification or division, whereby some who make lenses confine themselves entirely to the work of making them in accordance with prescriptions given by physicians or oculists. These call themselves or are known as 'opticians'; others, who still manufacture the lenses, either according to their own judgment or the prescription of physicians, do not confine themselves to the making of lenses, but also examine the eyes for the purpose of ascertaining whether there are such defects visible as can be corrected by the application of lenses. This class have taken the name of 'optometrists', and

that is the name by which they are now generally known. Those who practice under the latter title are many in number, and they are recognized in many states of the Union as a class by themselves and regulated by statute. The ophthalmologist is the physician who specializes in diseases of the eye."

"The National Society for the prevention of Blindness was waging an intensive educational campaign during the month of September, 1950. The object: To teach the public that proper care and periodic examinations could save the vision of at least half of the estimated 22,-100 Americans who will go blind during the year 1950. Ironically, medical progress has posed a major problem for sight-savers. Increased longevity subjects more adults to blinding diseases that strike late in life. Some 800,000 persons, for example, slowly are going blind from glaucoma (internal pressure in the eyeball) and do not know it. If caught early by examination, the disease can be checked and remaining sight saved. Their figures show that some 4,500 cases of infectious diseases of the eyes which will cause blindness in 1950, 3,500 are preventable. Of the 3,500 cases of glaucoma which will cause blindness in 1950, almost 2,000 of these are preventable. Of the 6,500 cases of cataract which will cause blindness in 1950, some 3,500 are preventable. Of the 7,000 cases of all other causes which will result in blindness in 1950, 2,500 of such cases are preventable."

Percentage of Age Groups Needing Classes

Of persons 15 years of age or less	23%
Of persons 30 years of age	39%
Of persons 40 years of age	48%
Of persons 50 years of age	71%
Of persons 60 years of age	82%
Of persons over 60 years of age	95%

And all ages combined who need glasses—
Six out of ten!

Eye glasses are not a commodity. *They have no value other than to the person for whom they were prescribed.*

> "The Provisions of Section 4 of the Act, prohibiting the corporate practice of Ophthalmology and Optometry in Oklahoma, are valid enactments under the Police Power of the State in the interest of public health and welfare."

The first case to reach the Supreme Court of Mississippi on this question was the case of *Sears Roebuck & Co. et al.* v. *State Board of Optometry* (57 So. 2d 726) decided March 17, 1952. Just prior to the filing of this injunction suit in Chancery Court but after charges to revoke the license of the optometrist had been filed, the optometrist in the optical department at Sears Roebuck & Co. was on a straight salary of $400.00 per month. Later, and before trial, the parties entered into an elaborate lease-rental arrangement with the execution of numerous leases and agreements in an attempt to show the optometrist as maintaining his own practice separate from the optical business of the company. Concerning all

this the learned chancellor had the following to say in his written opinion when the case was decided and an injunction issued:

> "The weight of modern authority is against such arrangements as we have here, and the question presented is whether the optometrist is working for the defendant companies as an employee, or for himself as a licensed and independent practitioner.
>
> "It is only in the latter capacity that his status could be legal and his license authoritative in professional relation and service to the public.
>
> "The statutory edifice, relating to and regulating optometry in the State of Mississippi, excludes all that it does not include, and merchants and druggists are authorized only to sell and assist purchasers in fitting spectacles and eyeglasses over the counter, and in their place of business at the time of sale.
>
> "They are not permitted to hire an optometrist with his license as a screen to hide them from the law while they commercialize the profession, and use him as a handy man to fit and sell glasses as merchandise. In this position the optometrist would be acting as a clerk or salesman, and the employer would in effect be practicing the profession without a license.
>
> "The law contemplates that the controlling principle in the use of the State's franchise will be the eye of the patient, and its preservation, and not the eye of the employer in its scrutiny and search for profit.
>
> "In other words, the *conscience* of the practitioner should guide him in his service, and not the company's cash register where the sales are rung up.
>
> "Professional responsibility and the public welfare demand that the human eye, above all things,

be held sacred, and in no sense an object of commerce in routine traffic of equipment purporting to be for its benefit.

"It is not thinkable that the State, after a scientific and studied examination of the applicant, would issue him a license, over its Great Seal, to go out and tamper with the human eye as with a commodity in the market place, and the wares which merchants buy.

"And when we think of the children, in increasing numbers, who are helpless in submission to this procedure when their sight is at stake, we lose patience with everything except fidelity to duty, and the highest altruism in providing what Nature requires in such delicate and vital situations.

"Surely an optometrist should be absolutely independent of everything and everybody except his profession, and the people who confidently depend upon him to aid them in improving and preserving their sight.

"It is alleged in defense that the optometrist in this case is not an employee, but is a lessee or tenant of Sears, and

"Second, that optometry is not a profession, but a trade.

"Copies of alleged leases, sub-leases and correspondence agreements were introduced in evidence to show that the optometrist rents a small space at the Sears' store for $200.00 a month, and in turn subrents a part of this space to the Louisiana corporation for $600.00 a month, giving the optometrist a net take of $400.00 a month at the very outset.

"The Louisiana corporation is the third party to this triangle, and its business is supplying the glasses which the optometrist sells.

"There are other features of these complicated contracts, with their intricate and interlocking arrangements, that are too involved for comment, and which for the present might be passed over.

"I am of the opinion, from the evidence, that the optometrist is not renting working space as a tenant in the Sears Roebuck establishment, but is simply occupying it as an employee or clerk, and that the four hundred-dollar net income from the sublease is his assured salary, plus such additional amounts as may have been agreed upon.

"This is the only reasonable view that the circumstances present, unless we assume that the great Sears chain enterprise has gone into the landlord and tenant business to help defray expenses, or increase its income from sales of its vast variety and volume of merchandise.

"If the optometrist is a *mere mechanic* as contended, he may be employed by any person or corporation as any other mechanic is employed. But if his work transcends simple mechanical processes, to the extent that it is a profession or learned avocation, and licensed only after examination to test the scope and sufficiency of this learning, then he is not a mere mechanic, and may not be so employed.

"The Mississippi statutes, like the statutes now of practically all the states in our Union, make optometry a learned profession, within the English meaning and definition of that term.

"In this view, and with that intent, a whole chapter in our Code of 1942 defining, authorizing, regulating and licensing the practice of optometry has been enacted into law, and set up by the Legislature in this State.

"Section 8832 provides that,

" 'The practice of optometry is defined to be the application of optical principles, through technical

methods and devices in the examination of human eyes for the purpose of ascertaining departures from the normal, measuring their functional powers, and adapting optical accessories for the aid thereof.'

"And Section 8840 states that,

" 'Any person over the age of 21 years, of good moral character, and who has graduated from high school or preparatory school affiliated with and recognized by a State University and who has graduated from a reputable school or college of optometry, maintaining a two-year course in optometry, each session seven months in length, and offering a course or standard equivalent to that required by the Federal Board of Vocational Training, shall be entitled to stand the examination for license to practice optometry in Mississippi. The examining Board of Optometry shall keep on file a list of schools or colleges of optometry which are recognized by said Board, and which give a course in optometry equivalent to the requirements or standards heretofore specified. The examination to practice optometry shall consist of tests in practical, theoretical, and physiological optics, in theoretical and practical optometry, and in anatomy and physiology of the eyes, and in pathology as applied to optometry.'

"Surely there is something more than a mere mechanic in those statutes.

"I am a pretty good mechanic myself, but I could not qualify as an optometrist.

"An oculist or ophthalmologist is an eye doctor, or specialist, and he may treat the eye with medicine or surgery.

"An optician is a person who grinds the lenses and makes the glasses, according to the prescription of the optometrist, but he is not necessarily nor usually an optometrist.

"In other words, this optometry business, in modern law, and by modern standards, is a highly specialized calling, and in some states a four-year college course is required to complete the study.

"That the physical laws of optics and optometry are strictly mechanical is exactly true. And it is likewise true that everything in the whole system of Nature is mechanical. They all derive from mechanical forces and mathematical principles, but it takes something more than a mechanic or mathematician to apply and interpret them.

"The angles of incidence and reflection and retraction are always the same. The principles of polarization, diffraction, and diffusion of light never change. The spectrum arrangement and order of colors in prismatic effect are forever alike. The same is true of all physical laws, but the eye itself is different and varied in every human being on the earth.

"The organic structure and function of the human eye, with its incessant modifications and changes, and the infinite variety of form and focus and fitness, presents the resulting sight as the one transcendent mystery of created things. I look out there and see each of you as definitely different and distinct personalities. And you see me, but no one knows why. We know the effect but not the cause, the objective and empirical phenomena, but not the subjective and spiritual realities that make them work.

"And this strange organ has its own peculiar pathology. It is subject to disease and disorder and deformity in many explicable ways, and unknown tendencies. It is not a thing for a mechanic to monkey with, either in fitting it with glasses, or in stimulating it with medicine.

"Sir Isaac Newton, whose experiments with light are the foundation of modern optics, was good

at making lenses for spectacles and telescopes, but he was not an optometrist. It was he who discovered and described the law of gravitation, the binominal theorem, the integral and differential calculus, the necessary action of all the forces of elemental and universal nature, and in fine the mechanical and mathematical principles of natural philosophy. But he was not an optometrist. He knew his mechanics and his mathematics, but he did not know his eye.

"Joseph Fraunhofer, the Bavarian physicist, who contributed much to the science of optics in his study of light, and Nickolaus Hartsoecker, the Dutch philosopher, were both noted opticians, but they were not optometrists.

"In their time the profession was undeveloped, and its importance as a scientific service not understood. This was true of the whole field of scientific knowledge, and especially true of the more improved methods of preserving the human body, and conserving the general health of mankind.

"The reason for the old law which permitted and still permits the sale of spectacles over the counter by merchants and druggists is obvious.

"It extended a cheap and convenient aid to persons unable at the time to invest in more expensive equipment, and it had the merit of enabling the purchasers to select their own glasses, and to fit them to suit themselves.

"It was a boon to the old and weak and poor of all races in threading needles, glancing at the local news in the small town weekly, and reading the Word at twilight that came from the prophets of long ago.

"The advent of the optometrist, and the increasing need for his services in this competitive and complex age, makes it of extreme importance that he measure up to all the requirements, and serve his

patrons to the best of his ability, and in the spirit and purpose of the law that approves him as worthy of his profession, and of the franchise granted him to practice it.

"The injunction should issue."

The corporations appealed from this adverse decision of the Chancery Court to the Mississippi Supreme Court (*Sears Roebuck & Co.* v. *State Board of Optometry, supra*), and in affirming the injunction issued by the lower court, the Supreme Court had the following to say:

"At various times in 1950 Sears ran advertisements in the Jackson newspapers. They were billed to and paid by Sears, who later charged their costs to Craftsman. They were run under the name of 'Optical Department, Sears, Roebuck and Company.' One typical advertisement welcomed the public to Sears' new optical department where the public would receive 'a thorough eye examination by a registered optometrist, visual analysis * * * glasses compounded,' etc. In one corner of the advertising was printed the following: 'Dr. C. S. McAlister, Registered Optometrist in Charge. Full time office at the Optical Dept. Long experienced in practice of examining eyes for glasses in Mississippi. Dr. Carey S. McAlister personally invites you to come in for a visit at your convenience.' Since January 18, 1951, Sears has published no advertisements of the optical department. Dr. McAlister has run them individually. Several pictures of the space leased by Sears to McAlister and subleased by McAlister to Craftsman appear in the record. One of those photographs indicates that McAlister's office and the optical dispensary are very close to the men's clothing department and other quarters in the Sears' store contain-

ing general merchandise, and that they are physically integrated with the other merchandising parts of the store.

"Only two witnesses testified, and both of them were presented by appellee, complainant below, State Board of Optometry. The first witness was Miss Katherine Hornsby. On December 4, 1950, Miss Hornsby was working as a Secretary for the attorney for the appellee Board. At his request, she went to the optical department at Sears, and advised Dr. McAlister that she needed some glasses. She then said: 'He examined my eyes and told me I had a slight defect there and he thought glasses might correct it. He wrote the prescription and I asked him if he would give me the prescription and let me think about getting the glasses and take it home with me. He said he couldn't give me the prescription but he wrote it out on a little piece of paper.' She stated that McAlister said that he could not give her the prescription which he had written, but upon her insistence he finally handed her a piece of paper purporting to be a prescription. It apparently was written on the back of a torn check. It contained her name, but not the doctor's name, and had some letters and figures on it. She later returned to Dr. McAlister, when he showed her some frames and measured her head for them. She paid him $31.78 for the glasses, and he gave her a receipt for that payment evidenced by a Sears' sales ticket. She tried to wear the glasses but they caused a blur and gave her a headache. With reference to whether McAlister charged a fee for his services, Miss Hornsby said that he told her there would be no fee, that he felt that if she had the prescription filled, she would let them do it. And the sales ticket reflects only a charge for the glasses.

"The other witness for complainant was Dr. C. R. Von Seutter, a registered optometrist practicing in Jackson. He examined Miss Hornsby's eyes, but

the court excluded his testimony, which appellee stated would be that in fact Miss Hornsby did not need glasses of any kind at the time McAlister sold them to her.

"The chancery court in its final decree enjoined Sears and Craftsman from the practice of optometry 'directly or indirectly, and from employing, by any means, registered optometrists or physicians and surgeons to examine the eyes of their customers and prescribe eye glasses in the State of Mississippi.'

"(1) We think that the Optometry Act has the effect of prohibiting a corporation from practicing optometry through a licensed employee. This appears to be the legislative purpose. And this conclusion is in accord with the substantial weight of authority from other states as well. 13 Am. Jur., Corporations, § 837, summarizes the rule: 'It is generally held that in the absence of express statutory authority a corporation may not engage in the practice of optometry either directly or indirectly through the employment of a duly registered optometrist.' See also 41 Am. Jur., Physicians and Surgeons, § 28; 19 C. J. S., Corporations, § 956, pages 411-412; 70 C. J. S., Physicians and Surgeons, § 10, pages 843-844.

"The statute requires a practitioner of optometry to be a 'person,' who is over 21 years of age, of good moral character, who has graduated from a reputable school of optometry, maintaining a two-year course, and who has passed the required examination. It is apparent that no corporation is entitled to be registered and to practice optometry through employees under these requirements. Other courts have reached this same result. In *State ex rel. Beck* v. *Goldman Jewelry Company*, (1935), 142 Kan. 881, 51 P. 2d 995, 102 A. L. R. 334, the Kansas statute was similar in many respects to the Mississippi act, and the Court so held.

"The statute in *Funk Jewelry Co.* v. *State ex rel. La Prade*, (1935), 46 Ariz. 348, 50 P. 2d 945, established similar requirements as to who was entitled to practice optometry: He must be over 21 years of age, of good moral character, etc. The Court said: 'The qualifications of an optometrist, as thus outlined, of course exclude a corporation from the practice. It cannot qualify and cannot obtain a certificate of registration. It is not of the class of persons the Legislature intended to authorize to practice optometry. It does not possess the necessary moral and intellectual qualities.'

" '(3, 4) The rationale of the foregoing corporate prohibition is closely related to the legislative purpose and power of designating optometry as a profession. This clarifies the constitutional validity of the Mississippi statutes based upon the police power of the State. And the great weight of authority holds that the Legislature has the power to define optometry as a profession and to regulate it as such. Anno., 98 A. L. R. 905. Some of the many cases holding that a Legislature has validly classified optometry as a profession for regulatory purposes are *State ex rel. Loser* v. *National Optical Stores Co.*, (1945), 189 Tenn. 433, 225 S. W. 2d 263; *State ex rel. Sisemore* v. *Standard Optical Co. of Oregon*, (1947), 182 Or. 452, 188 P. 2d 309; *Kendall* v. *Beiling*, (1943), 295 Ky. 782, 175 S. W. 2d 489; *State ex rel. Standard Optical Co.* v. *Superior Court*, (1943), 17 Wash. 2d 323, 135 P. 2d 839; *Neill* v. *Gimble Bros., Inc.*, (1938), 330 Pa. 213, 199 A. 178; *Funk Jewelry Co.* v. *State ex rel. La Prade*, (1935), 46 Ariz. 348, 50 P. 2d 945; *McMurdo* v. *Getter*, (1937), 298 Mass. 363, 10 N. E. 2d 139. Illustrative of these decisions is *State ex rel. Sisemore* v. *Standard Optical Co. of Oregon*, (1947), 182 Or. 452, 188 P. 2d 309, 312, in which the Court said: 'The practice of optometry is undoubtedly one of the subdivisions of the practice of medicine, which

have arisen in modern times by reason of the necessity for specialization. It would seem that the public has as much need to be protected from quacks and charlatans in optometry as in dentistry or any other subdivision of medicine. *Cf. Semler* v. *Oregon State Board of Dental Examiners*, 148 Or. 50, 53, 34 P. 2d 311. One who consults an optometrist for ocular examination is entitled to the same undivided loyalty that he should receive from a physician. The fact that the optometrist is the employee of an optical concern whose main interest is the sale of optical goods tends to be a distracting influence which may adversely affect his loyalty to the interests of his patient'.

"(6) The remaining question is whether there is sufficient evidence in the record to support the finding of fact of the chancellor that Dr. McAlister, under his arrangements with Sears and Craftsman, is an employee of Sears and Craftsman. We think there is. The books are replete with cases analyzing attempts to evade the statutory prohibition against a corporation practicing optometry through a licensed employee. The courts carefully examine the factual relationships of the parties in order to determine whether the prohibited employer-employee relationship exists. We will not again detail the facts. Prior to the new arrangement of January, 1951, McAlister was admittedly an employee of Sears and Craftsman. After the complaint of December, 1950, had been filed against McAlister before the State Board of Optometry, the new arrangement of contractual relations between the parties was made, effective January 1, 1951. The chancellor was warranted in finding that this arrangement was an attempt to evade the statutory prohibition. It took the form of a lease of about 200 square feet from Sears to McAlister for a rent of $200 per month. On the same day McAlister subleased to Craftsman three-fourths of that space for a rental of $600 per month, giving

to McAlister an assured net income of $400 per month. Before that time he had been paid a salary of $90 per week; the new arrangement reached approximately the same result. That this arrangement was but a variation upon the prior situation and an evasion was recognized by the contract between Sears and Craftsman, by which Sears was to handle all of the accounts and bookkeeping for Craftsman and Craftsman was to pay Sears 25 percent of its gross sales, but was to obtain credit on that amount for the rental which Craftsman had to pay to McAlister for the sublease. With a minor exception, McAlister had access to his office only during the business hours of Sears' retail store. And Sears could cancel its lease on 30 days' notice. These and the other circumstances support the finding of the chancery court that in fact McAlister was practicing optometry as an employee of Sears and Craftsman. It is true that McAlister's lease from Sears authorized him to charge a $3 fee for each patient, and that he had a sign in his office to that effect. Miss Hornsby testified that in December, 1950, he refused to charge her a fee, but there was no proof under the January, 1951 arrangement McAlister was not charging a separate fee. Yet whether he did or not is simply one circumstance out of many relevant to the major issue of whether McAlister was in fact an employee of Sears and Craftsman.

"In *State ex rel. Beck* v. *Goldman Jewelry Co.*, (1935), 142 Kan. 881, 51 P. 2d 995, 1001, 102 A. L. R. 334, the Jewelry Company originally employed a licensed optometrist in connection with its optical dispensary, but after protest was made, the defendant company changed its method of doing business and rented to Jacobs, a licensed optometrist, space in its store. Under the contract, Jacobs was to furnish each of the company's customers free optometrical examinations. Jacobs paid rent of $20 a month for his space. The company would pay Ja-

cobs $2.75 for each examination, and Jacobs also had the right to carry on his own practice at the rented location and to retain his own fees. Jacobs was to do the mechanical work of preparing glasses and to receive a commission of 10 per cent of the gross amount of each sale. Either party could terminate the contract on 10 days' notice. Under the Kansas statute, somewhat similar to that of Mississippi, the Court held that the Goldman Jewelry Company was in fact the illegal employer of Jacobs. The COURT said:

"It argues, however, that it changed its method of doing business on July 19, 1935, and that its employee is now a licensee in control of the business and that it has no control over it. A quite similar arrangement was denounced in *State* v. *Kindy Optical Co.*, *supra*, and under *Eisenmith* v. *Buhl Optical Co.*, *supra*, and our own case of *Winslow* v. *Kansas State Board of Dental Examiners*, *supra*, (115 Kan. 450, 223 P. 308), it would seem a similar conclusion should be reached here. An examination of the contract between the defendant corporation and its employee Jacobs shows the lack of Jacobs' control, for the company can dispense with his services on ten days' notice whenever it concludes he is not producing enough sales of glasses to those referred to him for tests of the eyes. It likewise shows that Jacobs has nothing to do with the prices fixed for sales of glasses, and for his own services to the customer he is paid by the company and not by the customer. There is an entire lack of the relation that ordinarily exists between a professional man and his client. The fact the contract provides that Jacobs must supply and own his examining equipment and may have patients of his own does not cure the faults above noted; the company rather offset any advantage to Jacobs thereunder by requiring him to buy supplies of it, and it requires no statement to the

contrary in the contract, to inform us that it is at prices fixed by the company.'

"In *Ritzholz* v. *Arkansas State Board of Optometry*, (1944), 206 Ark. 671, 177 S. W. 2d 410, 411, Ritholz had prior to July, 1940, employed in his optical dispensary a physician. He was paid $40 per week. A later arrangement was outlined by the court as follows: 'The salaried physician (who also maintained an independent office at 319½ Main Street) contracted with Ritholz and his associates, to rent 96 square feet of office space occupied by National, payment to be $35 per month. This contract, *prima facie*, merely creates the relationship of landlord and tenant. Affirmative expressions were used in a seeming effort to emphasize what the Ritholzes now contend to have been the purpose—that is, merely to provide convenient office quarters for the physician in order that National customers might be accommodated if on their own initiative they elected to have professional assistance in those instances where advice of an optometrist was required. The contract physician testified that he charged $1 for examinations and received a commission of 20 percent on certain sales of glasses after examinations had been made by him at his office in the adjoining block. Compensation thus realized and that received from his private practice amounted to approximately $500 per month as distinguished from the former salary of $40 per week. He did National's work exclusively.

"'We think the case is controlled by *Melton* v. *Carter*, 204 Ark. 595, 164 S. W. 2d 453. In that case constitutionality of Act 94 was upheld. It was also said that the legislative object was to prohibit employment of an optometrist by one who is not licensed. In other words, under that decision, 'a layman may not engage in the profession by employing a licensed optometrist.'

"The decree in the instant case found that the lease agreement was collusive—'a fiction for the agency that exists between the parties,' as the Chancellor expressed it. We think the testimony sustains this finding.'

"*Neill* v. *Gimbel Bros., Inc.*, (1938), 330 Pa. 213, 199 A. 178, 180, involved a somewhat similar situation. The store leased to Diamond a portion of its floor space for the operation of an optical department. The court there said that when a lease is accompanied with 'such control as is here shown, the lessee becomes the agent of defendant, and as it is forbidden to practice (optometry), it may not do so through agents.'

"In *State ex rel. Bricker* v. *Buhl Optical Co.*, (1936), 131 Ohio St. 217, 2 N. E. 2d 601, the Buhl Optical Company operated an optical dispensary and for a while employed optometrists on a salary. Later the arrangement was changed by a written contract, under which the company leased to several optometrists certain office space in its optical goods store, in consideration of the lessee referring to company patients for whom they prescribed glasses. For examinations, the optometrists agreed not to charge more than $1, which fees the optometrists alone received. The court held that this arrangement was a subterfuge and that the optical company was in effect still the employer of the optometrists and was violating the statute.

"In a later Ohio case, *Rouce* v. *Standard Drug Co.*, (1937), 132 Ohio St. 629, 9 N. E. 2d 609, 612, the Standard Drug Co. and the May Co. abandoned the method of operation which had been condemned by the court in the *Buhl Optical case*. Standard leased floor space to Adelson for an optical department. Adelson subleased a part of the space to an optometrist, with lessor's consent. The sublease was made by Adelson to Dr. Kudysh, who

charged all patients who came to him a $1 examination fee, which he retained. At the end of each week, Adelson paid to Dr. Kudysh the difference between the total he received for examination fees for that week and $60, the $60 being the guarantee given by Adelson to Kudysh. Kudysh filled out prescriptions, and informed each patient that he could go to any optician he chose, but that if he so desired Adelson could fill the prescription. Although the court refused to hold the Standard Drug Company and the May Company in contempt, since the proof did not show that they knew of or had aided in the violation of the optometry statute, it held that Adelson and Dr. Kudysh were violating the act. It said that the court 'is not limited by the terms of the lease, but will consider the manner in which the optical business was conducted and the extent to which the corporation participated in transactions involving optometrists.

" 'Of course a lease, valid on its face, may be a mere sham or device to cover up the real transaction; but such a subterfuge will not be permitted to become a cloak for illegal practices. The courts will always pierce the veil to discover the real relationship. Where a corporation directly or indirectly engages in the practice of optometry the lease will afford no protection on a proper challenge of the illegality.'

"In *State* v. *Kindy Optical Co.*, (1933), 216 Iowa 1157, 248 N. W. 332, 335, the state sued to enjoin the defendant corporation from practicing optometry. The company operated stores distributing optical supplies. Earlier, the company had employed Jenson, a licensed optometrist, to manage its optical stores and to also serve as an optometrist therein. After the state had indicated it would take action, the company rearranged its relationship by executing to Jenson a lease of certain floor space in its store building in Des Moines. The lesser company agreed to pay Jenson $281.66 per month. All eye examina-

tions were to be under the exclusive control of lessee. On the same day by a separate contract the company employed Jenson for two years as a manager of its optical department. All monies derived from that business were to be deposited in the name of the company. The company paid Jenson a salary and certain percentages for that work. Advertisements appeared in the name of the company. The court said:

" 'The subtle attempt on the part of the defendant to evade the provisions of the Iowa statutes in reference to the practice of optometry, by employing a licensed optometrist to conduct its business, and by the execution of the alleged lease with its employee, is too patent to appeal strongly to a court of equity.'

" 'The execution of the so-called lease between the defendant and its employee Jenson, in connection with the contract of employment between the same parties, was also a sham and fraud and a too evident plan, purpose, and intent to evade the statutes herein referred to. It is true that the name of the defendant did not appear publicly in connection with the business, but the record shows without controversy that the business was in fact owned and operated by the defendant company. The defendant company controlled the conduct and policies of the business. Jenson was simply its employee on a stipulated salary. The so-called lease between the defendant and Jenson, under the terms of which the defendant, as lessor, was to pay Jenson, as lessee, $281 per month, was only a clever attempt to change the character of Jenson from an employee to a lessee, and does not change the fact that Jenson was an employee of the defendant company.'

"In *Ritholz v. Com. of Virginia*, (1945), 184 Va. 339, 35 S. E. 2d 210, 219, the proprietors of an optical store furnished offices to an optometrist and

guaranteed him a minimum income. He collected a $2 fee which he retained. He would deliver prescriptions to Ritholz, owner of the optical store. The court discussed a number of cases somewhat similar to the present one, and held that the optometrist was an employee of the store within the prohibitions of the statute; that whether the customers paid a separate fee to the optometrist is not controlling; and that 'the relationship of the parties is not changed by the different methods of payment.'

"In *State ex rel. Loser* v. *National Optical Stores Co.*, (1945), 189 Tenn. 433, 225 S. W. 2d 263, 266, the store furnished optometrists with a small office inside the building and guaranteed them a fixed minimum weekly income. The optometrists charged a $2 examination fee, which they retained. The court said the activities of the optometrists and the sales of the store were so merged and combined that they constituted a single operation and enterprise' and that the device by which the defendant used the services of the doctors amounted to 'an evasion of the law and is not a *bona fide* arrangement.' See also *Kendall* v. *Beling*, (1943), 295 Ky. 782, 175 S. W. 2d 489; *State ex rel. Standard Opt. Company* v. *Superior Court*, (1943), 17 Wash. 2d 323, 135 P. 2d 839; *McMurdo* v. *Getter*, (1937), 298 Mass. 363, 10 N. E. 2d 139; Anno. 102 A. L. R. 334, 128 A. L. R. 585, 121 A. L. R. 1455, 141 A. L. R. 883, 888."

The next case, involving this question, appealed to the Mississippi Supreme Court by a corporation was that of Busch. (*Busch Jewelry Co. et al.* v. *State Board of Optometry*, 62 So. 2d 770), decided February 9, 1953. In this case, Busch Jewelry Company employed a physician to examine the eyes of their customers to further their sales of glasses. The learned chancellor in the court

below had the following to say in his written opinion in granting an injunction:

> "It is the opinion of the Court that the defendant, Dr. F. M. Dooley, is an agent and servant of the defendant, Busch Jewelry Company, and the said defendant, Busch Jewelry Company, pays his privilege license and charges him no rent.
>
> "The Court further finds that Dr. Dooley is not practicing medicine and is only a 'front' for the defendant, Busch Jewelry Company, to practice optometry. Defendant, Dr. Dooley, is 84 years of age and testified that he served as a country doctor in various and sundry places in the State of Mississippi and other states until his retirement.
>
> "It is further the opinion of the court that the defendant, Busch Jewelry Company, did not employ Dr. Dooley because of any learning or knowledge of the eye that he may have, but solely for the purpose of the practice of optometry by the defendant jewelry company. The defendant, Dr. Dooley, cannot work for the best interest of the unfortunate persons coming into the jewelry store for examination of eyes, but is working solely for the best interest of the defendant jewelry company. In order for the defendant, Dr. Dooley, to receive his pay it is necessary that he prescribe glasses to be sold to the patients by the defendant jewelry company.
>
> "An injunction is granted as prayed for in the petition."

The Mississippi Supreme Court in affirming the lower court and sustaining the injunction had the following to say:

> "Corporation, which employed retired physician at monthly salary to examine eyes of its patients and prescribe spectacles for patients whose prescriptions

were filled by corporation, would be enjoined from engaging in practice of optometry, though under statute a physician has the right to perform optometrical work. Code 1942, § § 8832 to 8846, 8923-51.

"When a physician abandons practice of medicine and unlawfully engages in practice of optometry by becoming an employee of one not authorized to practice that profession, physician is subject to injunction at instance of State Board of Optometry.

Code 1942, § § 8832 to 8846, 8923-51.

"The record shows that Busch Jewelry Company is a corporation operating several stores in Mississippi as well as numerous stores in other states. Its home office is in Birmingham, Alabama, where lenses for its optical department are ground and finished and from which point they are mailed to its local stores for delivery to customers. Dr. Dooley is 84 years of age and began the practice of medicine in 1890. After following his profession at numerous places in Mississippi and Louisiana he retired from the practice in 1936 or 1937 and later took up the fitting and prescribing of glasses for the correction of defects in vision. He is regularly employed by the company at a salary of $400 per month and devotes his entire time to the business of that company in the examination of eyes and prescribing spectacles; this is done in an office furnished to him free of rent by the company in its store at Jackson and with the use of equipment furnished him by the company. He charges no fee for examinations and his prescriptions are filled by the company. He admits that he is practicing optometry but says that he considers his work as coming under his license as a physician. The company paid privilege licenses for him both as an optometrist and as a physician.

"Our statute does not authorize a physician to unlawfully engage in the practice of optometry but merely permits him to lawfully engage in that profession on the faith of his license as a physician without requiring him to take a further examination as to his qualifications as an optometrist. When he abandons the practice of medicine and unlawfully engages in the practice of optometry by becoming an employee of one not authorized to practice that profession we think both the employer and the employee are subject to injunction at the instance of the State Board of Optometry and that the physician in such case cannot hide behind his license to practice medicine. The chancellor was justified in finding from the evidence, as he did, that Dr. Dooley is not practicing medicine but is only a 'front' for Busch Jewelry Company in unlawfully practicing optometry. By the decree appealed from Dr. Dooley was not enjoined from practicing medicine but only from unlawfully practicing optometry. He is still permitted to practice medicine or optometry on his own account in a lawful manner. The decree of the lower court is therefore affirmed."

The appellants, Busch Jewelry Company and Dr. F. M. Dooley, defendants in the court below, brought this case before this Honorable Court and on October 12, 1953, *certiorari* was denied. (*Busch Jewelry Company, a Corporation, and Dr. F. M. Dooley, petitioners, v. The State Board of Optometry*, No. 134, 74 S. Ct. 34).

Again, in the third case involving this question, the Capitol Optical Company and their physician, Dr. J. J. Savell, appealed from an injunction granted in Chancery Court to the Mississippi Supreme Court. (*Capitol Optical Company et al. v. State Board of Optometry*, 70

So. 2d 15), decided February 8, 1954. In this case the physician had a lease on space measuring some five by ten feet in the Capitol Optical Company place of business and they each contended the physician had his own separate practice independent of the company. The learned chancellor, in his decree granting an injunction had the following to say as to this:

> "The court is of the opinion that the defendant, Dr. J. J. Savell, is the agent and servant of the defendents Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company, and that said Dr. J. J. Savell is not practicing medicine but is aiding and abetting and making it possible for the defendants Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company, to practice optometry. It is further the opinion of the Court that the defendants Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company did not employ Dr. Savell because of any learning or knowledge of the eye that he might have, but solely for the purpose of the practice of optometry by the said Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company. The defendant, Dr. Savell, cannot work for the best interests of the unfortunate persons coming into the Capitol Optical Company store for examination of eyes, but is working for the best interests of defendants Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company. In order for the defendant, Dr. Savell, to receive his pay it is necessary that he prescribe glasses to be sold to the patients of the defendants, Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company."

Notwithstanding a stipulation entered into and filed in the Mississippi Supreme Court to the effect the parties

agreed that the decision in the *Busch Jewelry Company case, supra,* would be controlling in this case, the appellants insisted on presenting their appeal and in affirming the injunction granted by the lower court, the Supreme Court had the following to say:

> "Where partnership rented office space in its store to a physician authorized to practice optometry, and guaranteed a minimum weekly income, and physician spent full time during office hours prescribing eye glasses, which prescriptions were filled by partnership, partnership and physician were engaged in unlawful practice of optometry.
>
> "There is no substantial difference between the facts and controlling principles in this case and those in *Busch Jewelry Co.* v. *State Board of Optometry,* 216 Miss. 475, 62 So. 2d 770, *certiorari* denied, 346 U. S. 830, 74 S. Ct. 34, 98 L. Ed.
>
> "Capitol Optical Company is a partnership firm composed of Tony Sward, R. M. Gardiner, and John Mayfield. These partners are engaged in business in Chicago, Illinois, as a partnership under the trade name of M. G. S. Optical Service. Under that trade name they employed Dr. J. J. Savell, a licensed physician under the laws of Mississippi to work for them in prescribing eye glasses in their optical store in Jackson, Mississippi, at a salary of $104 per week. That agreement was oral. After our decision in *Sears, Roebuck & Co.* v. *State Board of Optometry,* 213 Miss. 710, 57 So. 2d 726, the parties entered into a written contract whereby the partnership rented to Dr. Savell office space in its store measuring approximately 10 feet by 5 feet for the price of $40 per month and guaranteed him a minimum income of not less than $114 per week. This contract was subject to cancellation by either party on 10 days' written notice. Dr. Savell testified that

he gives full time to the business of Capitol Optical Co. during office hours, but does some outside medical practice on his own account outside of office hours. He contends that his prescribing of eye glasses is done pursuant to his license as a physician and not as an optometrist, but the lower court adjudicated that he is unlawfully engaged in the practice of optometry as an employee of Capitol Optical Co. and enjoined him and the partnership, Capitol Optical Co., from further unlawfully practicing optometry.

"From the final decree of the chancery court an appeal was taken to this Court and the record was filed here on November 1, 1952. The appellants and appellees entered into a written stipulation duly filed in this Court to the effect that the decision in this cause will be controlled by the decision of the United States Supreme Court in the *Busch Jewelry Co. case, supra*, and agreeing that this case should be passed on this docket until the Supreme Court of the United States acted on the appeal in the *Busch case*.

"Notwithstanding this stipulation, the appellants have filed a lengthy brief raising substantially the same questions which were raised and passed upon in the *Busch case*. These questions were settled in the *Busch case*. The decree in this case does not deprive Dr. Savell from engaging in the practice of medicine in a lawful manner. It only enjoins him from practicing optometry in an unlawful manner and it is accordingly affirmed.

"Affirmed."

CONCLUSION

WHEREFORE premises considered, the Attorney General of Mississippi respectfully asks the Court to hold

that House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 13, Title 59, Page 271, Oklahoma Session Laws 1953) is in its entirety a valid and constitutional statute of the State of Oklahoma; to decline to enjoin the defendant, Attorney General of Oklahoma and/or the defendants, County Attorneys of Oklahoma, from enforcing the provisions thereof; and to issue an order permanently enjoining Respondents from future violations of the provisions of said Act.

Respectfully submitted,

J. P. COLEMAN,
Attorney General of Mississippi,

RICHARD A. BILLUPS, JR.,
Special Assistant Attorney General,
Jackson, Mississippi

JANUARY, 1955

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UNITED STATES SUPREME COURT

OCTOBER TERM 1954

184
185

MAC Q. WILLIAMSON, Attorney General, *et al.*,
Appellants,

vs.

LEE OPTICAL OF OKLAHOMA INC., a corporation, *et al.*

LEE OPTICAL OF OKLAHOMA INC., a corporation, *et al.*,
Appellants,

vs.

MAC Q. WILLIAMSON, Attorney General, *et al.*

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF IN SUPPORT THEREOF

AND

BRIEF ON BEHALF OF PENNSYLVANIA OPTICAL COMPANY, AS *AMICUS CURIAE*

HAMILTON HICKS,
Attorney for PENNSYLVANIA OPTICAL COMPANY, *Amicus Curiae*,
2 East 54th Street,
New York, N. Y.

HICKS & WELLER,
Of Counsel.

UNITED STATES SUPREME COURT

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MAC Q. WILLIAMSON, Attorney General, *et al.*,
Appellants,
vs.
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Appellants,
vs.
MAC Q. WILLIAMSON, Attorney General, *et al.*

MOTION

Now Comes Pennsylvania Optical Company, a Pennsylvania corporation, and respectfully moves this Honorable Court for leave, through its attorney, to file a brief *amicus curiae* for the special reasons set forth in the accompanying brief in support of this motion.

Dated, New York,
February 4, 1955.

HAMILTON HICKS,
Attorney for PENNSYLVANIA OPTICAL COMPANY as *Amicus Curiae*,
2 East 54th Street,
New York, N. Y.

HICKS & WELLER,
Of Counsel.

BRIEF IN SUPPORT OF MOTION OF PENNSYLVANIA OPTICAL COMPANY TO FILE A BRIEF *AMICUS CURIAE*

Pennsylvania Optical Company manufactures ready-to-wear eyeglasses equipped with convex spherical (magnifying) lenses which are sold over-the-counter at retail stores to customers who make their own selections. Millions of such eyeglasses are sold annually in 44 states, under laws permitting their over-the-counter sale without prescription. Pennsylvania Optical Company has engaged in this business since 1886 and is the largest manufacturer of such articles in the United States.

These eyeglasses do not correct vision and have no effect, good or bad, on refractive error or pathological disorders. They clarify the image and are used extensively as reading glasses by middle-aged persons. In workmanship, material and quality, such eyeglasses compare with the best prescription glasses, but the retail cost runs from less than one dollar to about three dollars, according to style. They are harmless. Any individual may select a reading glass in the same way in which he chooses shoes, the difference being that an ill-fitting shoe can inflict damage, but a reading glass of the wrong strength has no harmful effect on the eye, nor on the pathology of the wearer (R. 100-101).

These magnifying glasses were not involved in this litigation. The suit was brought by dispensing opticians (who grind lenses prescribed by a physician or an optometrist, who is not a physician, R. 37, n. 3) to test the constitutionality of an Oklahoma statute which forbids opticians to duplicate prescription lenses and to replace such lenses in new frames without prescription. The Act expressly exempts from regulation the over-the-counter sale of magnifying lenses.

The District Court held that, since opticians are competent to duplicate prescription lenses and replace them in frames without prescription, the Act bears no reasonable relation to public health and is, therefore, an arbitrary

denial of the due process guaranteed by the Fourteenth Amendment. The Court went further, however, and assigned as a *principal* ground for striking down the pertinent provisions of the Act, the theory that there is no real difference between ready-to-wear magnifying glasses and prescription lenses and that "to regulate prescription eyeglasses * * * and yet expressly exempt ready-to-wear eyeglasses constitutes an unreasonable and discriminatory classification in contravention of the equal protection clause of the Fourteenth Amendment." (120 F. Supp. 128, at p. 139.)

By so holding, the court has, potentially, invalidated the optical laws of 44 states *without evidence in the record to support its conclusion that the exempted eyeglasses are identical with prescription eyeglasses* and it has virtually legislated out of existence an important industry useful to millions of people. Yet the case is one in which no member of that industry was involved. No qualified person was given the opportunity to fully present the evidence that the two classes of lenses are wholly distinguishable for regulatory purposes. By invoking the equality clause without foundation, the court violated a cardinal rule established by this Court that federal courts should not, by declaratory judgment, invalidate the exemptions, established by state legislatures *when any facts reasonably can be conceived to sustain them.*

> *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527 (1931) at p. 537;
> *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945) at p. 471.

The foregoing facts and questions of law were not adequately presented by the parties below and are not likely to be presented adequately on these appeals, because:

1. The plaintiffs have no interest in the art and business of producing ready-to-wear convexspherical glasses and, since they benefit by the District Court's error in assuming that all eyeglasses are within the same category,

are not to be expected to advise this Court that the trial court erred, and

2. At the trial, the Attorney General introduced no evidence and made no argument relating to the matter of discrimination and the equal protection clause, stating that he thought that the exemption clause was not involved in this case (R. 194). Moreover, in his seventy-five page brief filed in this Court on this appeal, *the Attorney General has not argued the issue of the application of the equality clause, and has cited no cases on that point.* Furthermore, although the burden of advising this Court on this issue lies, primarily, with the Attorney General, he has refused the request of Pennsylvania Optical Company for consent to an appearance *amicus curiae.* Still further, his letter of refusal, (a copy of which is attached hereto) states that he has consented to the appearance *amici curiae* of Guild of Prescription Opticians and American Optometric Association. *These organizations will not advise this Court impartially in respect to the exemption clause covering ready-to-wear magnifying glasses because they are active in sponsoring before all state legislatures restrictive statutes regulating, and making economically unsaleable, ready-to-wear convexspherical glasses.* They oppose exemption clauses such as the one in the Oklahoma statute and American Optometric Association, at its recent convention, *pledged itself to press such opposition in the legislatures of 44 states.*[1]

---

[1] Resolution adopted at June, 1954 Annual Congress of American Optometric Association, at Seattle, Wash.:

> "*Resolved*, that the American Optometric Association recommends to its affiliated state associations the desirability of causing the introduction of legislation to prevent the indiscriminate sale of ready-made eye glasses as merchandise so that the unsuspecting and unknowing public may be protected against the dangers which may flow through the use of these articles."

This resolution is published in the October, 1954 issue of "Guilderaft", the organ of Guild of Prescription Opticians of America, Inc.

It is, therefore, certain that unless this Court permits Pennsylvania Optical Company to file a brief *amicus curiae*, *none of the parties and amici curiae now before the Court will present the issue* and the Court, in what amounts to a virtual *ex parte* proceeding, will, by silence, be invited to affirm an erroneous ruling of the District Court which does violence to an important principle of constitutional law, and is capable of destroying an entire industry.

The industry which Pennsylvania Optical Company represents and the large segment of the public served by it are innocent bystanders whose interests face destruction because the trial court was confused by the general term "eyeglasses." Unless this Court expressly disavows the District Court's misapplication of the equality clause to optical goods, the effect of the error will be far reaching.

Pennsylvania Optical Company respectfully requests the opportunity to be heard on this important point.

Respectfully submitted,

HAMILTON HICKS,
Attorney for PENNSYLVANIA OPTICAL COMPANY as *Amicus Curiae*.

HICKS & WELLER,
Of Counsel.

(GREAT SEAL OF THE STATE OF OKLAHOMA 1907)

MAC Q. WILLIAMSON
Attorney General

STATE OF OKLAHOMA
OFFICE OF THE ATTORNEY GENERAL
OKLAHOMA CITY

February 2, 1955

MR. HAMILTON HICKS
Attorney at Law
2 East 54th Street
New York, New York

Dear Sir:

We have just received your telegram asking us to consent to the filing of a brief amicus curiae in the Lee Optical case by your client, Pennsylvania Optical Company.

This is to advise you that we have already agreed to the filing of a brief amicus curiae by the "Guild of Prescription Opticians," same being represented, we understand, by Stinson, Mag, Thomson, McEvers & Fizzell, 9 West 10th Street, Kansas City, Missouri. It is our understanding that the Guild will present the views of the optical companies. In consideration of our said agreement, Lee Optical has consented to the filing of a brief amicus curiae by the American Optometric Association, who are represented by Philip B. Perlman, Attorney, Suite 1021, Tower Building, 14th & K Streets, Washington 5, D. C. We suggest that the Pennsylvania Optical Company contact the Guild of Prescription Opticians as to the issues it desires presented in the Guild's amicus curiae brief.

We believe it would create confusion for a separate amicus curiae brief to be filed by the Pennsylvania Optical Company, and hence we respectfully decline to consent thereto.

We are mailing a copy of this letter to Stinson, Mag, Thomson, McEvers & Fizzell, and to their associate counsel, Duke Duvall, Liberty National Building, Oklahoma City, Oklahoma.

Yours very truly

FOR THE ATTORNEY GENERAL

FRED HANSEN

Fred Hansen
First Assistant Attorney General

FH:LW

INDEX

PAGE

STATEMENT OF THE CASE 1

THE INTEREST OF PENNSYLVANIA OPTICAL COMPANY... 2

ARGUMENT

POINT I—The Oklahoma statute exempts the over-the-counter sale of optical goods which differ substantially from the articles which are regulated 4

POINT II—In a declaratory judgment proceeding, the federal courts will assume that the legislature was warranted in excluding certain activities from the application of a regulatory statute. When any facts reasonably can be conceived to sustain an exemption, this Court will not disturb it 7

POINT III—The District Court overstepped the salutory rule of restraint against striking down state statutes in actions for declaratory judgments... 11

CONCLUSION 14

TABLE OF CASES CITED

Alabama State Federation of Labor v. *McAdory*, 325 U. S. 450 (1945) 11

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89 13

Commonwealth v. *S. S. Kresge Co.*, 267 Mass. 145, 166 N. E. 558 (1929) 12, 13

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540.... 10n

PAGE

Dominion Hotel v. *Arizona*, 249 U. S. 265 (1919) 10

Goesaert v. *Cleary*, 335 U. S. 464 (1948) 10
Great Lakes Co. v. *Huffman*, 319 U. S. 293 (1943) .. 11n

Kotch v. *Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947) 11
Kresge v. *Ottinger*, 29 F. (2d) 762 ..... 12, 13

Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61.. 9

Packer Corporation v. *Utah*, 285 U. S. 105 (1932) ... 9
Polhemus v. *American Medical Association*, 145 F. (2d) 357 (C. C. A. 10th Circ. 1944) 10

Re Cardinal, 170 Cal. 519 9
Robinson v. *Lee*, 122 F. 1010 (C. C. D. S. C., 1903), c.c. 196 U. S. 64 4
Roschen v. *Ward*, 279 U. S. 337 (1929)..... 12

San Francisco Shopping News Co. v. *City of South San Francisco*, 69 F. (2d) 879 (C. C. A., 9th Circ. 1934), certiorari denied, 293 U. S. 606 9
State Board of Tax Commissioners v. *Jackson*, 283 U. S. 527 (1931) 9, 10, 13

Tigner v. *Texas*, 310 U. S. 141 (1940)..... 10

Wampler v. *Lecompte*, 282 U. S. 172 (1930) 8

STATUTES

Federal Declaratory Judgment Act, 28 U. S. C. A., Secs. 2201, 2202 1

Maryland Optometry Law (Ch. 652, Vol. 3, Art. 43, Acts of 1914, as amended) Secs. 358 and 369..... 15n

New York Education Law, Sec. 1432-a, Ch. 379, Laws of 1928 ..... 12n

PAGE

Oklahoma House Bill No. 953, Title 59 Okla. St. Ann. Secs. 941-947 ..... 1, 2, 3, 4, 5, 7, 14

Virginia Optometry Law (Code of Va. Laws, as amended) subd. 10 of Sec. 54-396 and Sec. 54-369.. 15n

Washington Optometry Law (Laws of 1919, ch. 144, as amended) Secs. 1 and 15 ..... 15n

MISCELLANEOUS

49 Col. Law Rev. 735 ("*Stare Decisis*", by W. O. Douglas) 15n

"Merchant of Venice" 15

"Pigs is Pigs", by Ellis Parker Butler..... 4, 4n

UNITED STATES SUPREME COURT

OCTOBER TERM 1954

184
185

MAC Q. WILLIAMSON, Attorney General, *et al.*,
Appellants,

vs.

LEE OPTICAL OF OKLAHOMA INC., a corporation, *et al.*

LEE OPTICAL OF OKLAHOMA INC., a corporation, *et al.*,
Appellants,

vs.

MAC Q. WILLIAMSON, Attorney General, *et al.*

BRIEF ON BEHALF OF PENNSYLVANIA OPTICAL COMPANY, AS *AMICUS CURIAE*

Statement of the Case

This is an action for a declaratory judgment construing Oklahoma House Bill No. 953[1] brought under the Federal Declaratory Judgment Act,[2] challenging the constitutionality of portions of the statute and for an injunction against their enforcement. The District Court held[3] that Section 2

[1] Title 59, Secs. 941-947, Oklahoma statutes, being an Act relating to visual care.

[2] 28 U. S. C. A., Secs. 2201, 2202.

[3] 120 F. Supp. 128.

is invalid in that it arbitrarily excludes opticians from fitting lenses and frames to the face and duplicating and placing in frames lenses which have been prescribed or are intended to aid human vision, in violation of the due process and equal protection[4] clauses of the Fourteenth Amendment. The court also held that sections 3 and 4 of the Act violate the due process clause by prohibiting the advertising of frames, mountings and other optical appliances (Sec. 3) and by forbidding the practice of visual care in retail stores (Sec. 4). The District Court coupled its declaratory judgment with injunctive relief. The Attorney General appeals from the entire judgment (No. 184). The plaintiffs, who are dispensing opticians, appeal from the judgment in that it fails to declare the prohibition in Section 3 against advertising eyeglasses invalid under Article I, Section 8, of the Constitution and the equal protection and due process clauses of the Fourteenth Amendment thereto (No. 185).

The Interest of Pennsylvania Optical Company as *Amicus Curiae*

Pennsylvania Optical Company, as *amicus curiae,* submits that the District Court erred by including the equal protection clause as a principal ground for invalidating parts of Section 2. The *amicus curiae* supports the contention of plaintiffs that the section is unconstitutional, but only because it contravenes the due process clause. The District Court, however, said that the exemption of sellers of ready-to-wear glasses is a defect "of even more significance" than the objections to the Act under the due process clause (120 F. Supp. at p. 138). The application of the equality clause to Section 2 may foreclose substantial rights of the public and of Pennsylvania Optical Company in respect to a class of optical goods not directly involved in this case. Those goods consist of ready-to-wear glasses equipped with convexspherical lenses which Penn-

[4] The *Amicus Curiae* is concerned only with the application of the equality clause to this case.

sylvania Optical Company has manufactured in quantity[5] since 1886, sun glasses and industrial glasses with plano lenses.

The conclusion that Section 2 violates the equality clause is based on a misapprehension of the subject matter of the exemption provision in Section 3 of the statute. The trial court's misconception led it to formulate a doctrine that will plague an important industry and millions of people who require its products, unless disavowed by this Court.[6]

The lower court placed the sale of the exempted goods in the same class, from the standpoint of public health, as the fitting of frames and lenses and duplicating of prescription lenses. The exempted ready-to-wear convexspherical lenses are, however, common magnifying glasses. By classifying such goods with prescription lenses, the District Court has, in effect, made a predetermination which will invite regulatory measures designed to place ordinary magnifying glasses beyond the financial reach of a large segment of the public. It is no answer to say that such regulations, if arbitrary, will fall when challenged. Should the highest Court rule that, as to the police power, magnifying lenses and prescription lenses are alike, restrictions which may reasonably be applied to the latter may be accepted by the lower courts as applicable to the former; evidence of what, in reality, is reasonable for a particular

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[5] Over 300,000,000, sold in 44 states under laws similar to the Oklahoma statute in that they recognize the distinction between convexspherical lenses and prescription eyeglasses and permit the over-the-counter sale of the former, or go further and permit the sale of all eyeglasses as merchandise.

[6] The District Court said (120 F. Supp. at p. 139): "If it be desirable for the public protection that opticians sell merchandise and service only upon written prescriptive authority, the legislature cannot at the same time permit the unsupervised sale of ready-to-wear (convex spherical lenses) eyeglasses."

lens may succumb to the artificial judicial doctrine that all lenses are the same.

The erroneous classification is not only unsupported by the evidence; it is contradicted by the meager proof received on that subject. The goods exempted by the Act were not involved in this controversy. The classification originates in semantic confusion similar to that underlying the zoological blunder celebrated by the anecdote of Ellis Parker Butler.[7]

All eyeglasses are not eyeglasses within the meaning of the equal protection clause of the Fourteenth Amendment. Lenses vary in their impact on the public health. Although the error in classification may not affect the parties to this suit, still it may decide the general question, and so anticipate a final decision involving non-participants. *Robinson* v. *Lee*, 122 F. 1010 (C. C. D. S. C., 1903), c. c. 196 U. S. 64. If, in sustaining the result reached by the District Court this Court will rectify the fallacy which impairs it, an unwarranted predetermination of the rights of others will be avoided.

POINT I

The Oklahoma statute exempts the over-the-counter sale of optical goods which differ substantially from the articles which are regulated.

The Act[8] provides that nothing therein:

> "* * * shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at

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[7] "Pigs is Pigs", by Ellis Parker Butler, Doubleday & Co., Inc., 1952.

[8] 59 Okla. St. Ann. Secs. 941-947.

> any established place of business and where the selection of the glasses is at the discretion of the purchaser'' (Sec. 3, R. 39).

Glasses equipped with convexspherical lenses are ordinary magnifying glasses which do not correct vision, except that they magnify (R. 81, 193). They are not fitted, or adapted to the patient's face. The user selects them himself. No prescription is involved, nor is a prescription required because, as plaintiffs' expert witness, Dr. Coston, testified (R. 100-101), they are reading glasses of a type which anyone may have occasion to use, and they do no harm whatever. They are sometimes called ''dime-store'' glasses (R. 81, 100), although the description is anachronistic. As Dr. Coston said, they are cheap glasses with enough (magnifying) power to help people who need a reading glass. Such a person may, by going down the counter, select a glass which magnifies sufficiently to enable him to read (R. 100).

It is common knowledge that, with most people, the focus of the normal eye changes with age so that, although the vision is unimpaired, close reading becomes difficult. People of middle age conventionally describe this familiar condition by observing that their eyes are alright but their arms are too short (R. 159). A magnifying, or ''plus'', lens permits such persons to read comfortably. The pocket magnifying glass used by some to read the telephone book in a dark booth, or to examine fine print, is a convexspherical lens.

When such lenses are placed in spectacle frames, so that the object observed by each eye is magnified, the lenses are of equal power. They are not ground to accommodate the divergent refractive or therapeutic requirements of each eye (R. 81), as is the case with prescription lenses. There is no need for such adaptation, since the magnifying glasses do not correct optical defects nor treat disorders of the eye. Prescription lenses, on the other hand, may be ground cylindrically to correct the astigmatic error of

either eye, or prismatically to counterbalance muscular imbalance of the eyes (R. 94-95). Lenses ground according to prescription may be fitted, or adapted, to the face by a specialist (R. 73; 78-80). Convexspherical lenses are not (R. 81).

Prescription lenses are the result of a professional examination of the eyes for pathology or refraction. 122 F. Supp. at p. 134. If the diagnosis reveals a pathological condition, the lenses prescribed may be related to the therapy used for the treatment of the disorder, even though the lens itself has no curative power (R. 387). Since such lenses are the result of a professional diagnosis, their character should not be altered by the intervention of unskilled persons. It is beside the point that a wrong prescription will not damage the eye (R. 92, 104, 108, 113, 153, 329-330, 387, 446, 452-453), and that the use of self-selected convexspherical lenses is not injurious. The point is that, when a person receives a professional examination resulting in an optical prescription related to a pathological condition or to refractive error, he is entitled to the continued benefits of that prescription. The fact that a wrong prescription will not hurt the patient does not mean that the right prescription may not help him. Consequently, one who wears prescription lenses is situated differently, from the health aspect, from one who has purchased magnifying spectacles at a store. The former has a lens that reflects the professional judgment of a specialist, while the latter has a magnifying glass which has no attributes beyond the capacity to enlarge, or clarify, an image. The patient with the prescription lens is entitled to protection against activities which may bring about a deviation from the prescription. The purchaser of the magnifying glass needs no such protection.

The purchaser of the prescription lens has a continuing stake in the preservation of the benefits of the professional skill incorporated in the prescription. The purchaser of the magnifying glass has none. In his case, no question of

"duplication" is involved; if he breaks his spectacles, he buys another pair.

The Oklahoma statute purports to protect wearers of prescription lenses from activities which might vary the prescription. The fact that the method selected by the Legislature was unrealistic, and that prescription lenses may be duplicated mechanically or placed in new frames without distortion, does not diminish the difference between such lenses and convexspherical glasses selected by the wearer. The prescription lens continues to be the product of professional skill exercised in relation to the unique pathological or refractive needs of a particular individual. The prescription lens is personal in its application and purpose. The ready-to-wear magnifying glass is general; it resembles the binocular or telescopic rifle sight in that it is not built to the measurements of any individual but is designed for the use of all who find it serviceable.

POINT II

In a declaratory judgment proceeding, the federal courts will assume that the legislature was warranted in excluding certain activities from the application of a regulatory statute. When any facts reasonably can be conceived to sustain an exemption, this Court will not disturb it.

The record in the case at bar contains no evidence that the exemption clause is arbitrary. On the contrary, all of the evidence touching the subject is the other way. Plaintiffs argued briefly to the District Court that Section 2 was invalid because of the exemption clause in Section 3 (Pltffs.' brief below, pp. 44-48) but made no reference to the testimony beyond the assertion that there is no difference between the *effect* of identical convexspherical lenses whether prescribed or purchased ready-to-wear, and that all types of lenses are alike in that they are harmless. That

contention overlooks the fact that the wearer of prescribed lenses has a beneficial interest in the professional advice represented by the prescription, a condition which does not accompany the use of ready-to-wear spectacles (Point I, *supra*), nor does it dispose of the point that the only lens excluded is the simple magnifying glass, while the restrictions apply to all lens forms used in prescription work, including prismatic, cylindrical, bifocal, toric, contact, multifocal, etc. That a physician or optometrist may, in some cases, prescribe simple convexspherical lenses, or no glasses whatever, for patients who require little or no visual care or optical correction, does not invalidate the distinction drawn by the Legislature. The fact that physicians occasionally prescribe bread tablets would not invalidate a law regulating medicines which excluded bread.

The regulations found by the District Court to be arbitrary succumb to the due process clause, not the equality clause. If lenses are harmless whether prescribed or sold over the counter, the regulation is void because it is unrelated to health. The question of equality becomes academic, and it is sophistry to assert, in such a case, that because an article, under different conditions of use, is harmless in either case, an attempt to regulate one harmless use is void because it does not extend to the other.

Had there been any foundation for the Legislature's concern that the fitting and duplicating of lenses without a prescription at hand might endanger public health, the exemption of ready-to-wear magnifying glasses would still be reasonable. Even the absence of evidence establishing the purpose of the exclusion would not vitiate it.

In *Wampler* v. *Lecompte*, 282 U. S. 172 (1930), this Court said at pp. 174 *et seq:*

> "Nor is the equality clause violated by the special provisions that in certain inland waters blinds need not be placed farther apart than 250 yards.[9]

[9] The Maryland Conservation law required a 500 yard distance between duck blinds except in the case of riparian owners.

> The state court, relying upon *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, said: 'Why these provisions were inserted in the statute we are not informed, but we may assume, until the contrary is shown, that a state of facts in respect thereto existed which warranted the legislature in so legislating.' • • • This long-settled rule disposes also of the alleged discrimination created by the special exemptions applicable to certain other waters of the State."

And in *Packer Corporation* v. *Utah*,[10] 285 U. S. 105, (1932) this Court said at p. 110:

> "The legislature may recognize degrees of evil and adapt its legislation accordingly."

In *San Francisco Shopping News Co.* v. *City of South San Francisco*, 69 F. (2d) 879 (C. C. A., 9th Circ. 1934), certiorari denied, 293 U. S. 606, the court held that an ordinance prohibiting the distribution of an advertising "newspaper" which exempted newspapers publishing general news and advertising was not discriminatory, relying in part on the following statement of the California Supreme Court (69 F. (2d) at p. 884) in *Re Cardinal*, 170 Cal. 519:

> "The question of classification is primarily one for the legislative power, to be determined by it in the light of its knowledge of all the circumstances and requirements, the presumption in the courts is in favor of the fairness and correctness of the determination by the legislative department, and the courts are not privileged to overturn that determination *unless they can plainly see that the same was without warrant in the facts.*" (Emphasis supplied)

As was said in the opinion of the majority of the Justices in *State Board of Tax Commissioners* v. *Jackson*, 283

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[10] Upholding a Utah statute prohibiting billboard cigarette advertising but permitting such advertising in newspapers and periodicals.

U. S. 527 (1931), a very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations subjected to special regulation or taxation.

Of course, the mere fact that convexspherical lenses are "eyeglasses" is no criterion. Mr. Justice Holmes said, in *Dominion Hotel* v. *Arizona*,[11] 249 U. S. 265 (1919), at p. 268:

> "The Fourteenth Amendment is not a pedagogical requirement of the impractical. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way."

In *Polhemus* v. *American Medical Association*,[12] 145 F. (2d) 357 (C. C. A. 10th Circ. 1944) the court said at p. 359:

> "The matter of classification (of branches of the healing art) is for the state Legislature and cannot be interfered with by a federal court in the absence of a clear showing that the adopted classification is unwarranted and unreasonable."

And Mr. Justice Frankfurter said in *Tigner* v. *Texas*,[13] 310 U. S. 141 (1940) at p. 147:

> "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

In *Goesaert* v. *Cleary*, 335 U. S. 464 (1948) a majority of the Justices held that the equality clause was not violated

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[11] Exemption of railroad restaurants from the Arizona Hours of Labor for Women Statute, held valid.

[12] Naturopathic physicians were excluded from the benefits of the "Grandfather clause" of the New Mexico Basic Science law.

[13] Upholding Texas anti-monopoly law which exempted producers of livestock and agricultural products from its penal provisions, overruling *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

by the Michigan law forbidding women to be barmaids except the wives and daughters of male tavern owners.

The basis for the distinction in the Louisiana Pilots' case was decidedly narrow, but the statute was upheld by a divided Court. *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947).

POINT III

The District Court overstepped the salutory rule of restraint against striking down state statutes in actions for declaratory judgments.

In *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945), Chief Justice Stone said, at p. 471:

> "It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the Court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts. In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy *it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes.* See *Great Lakes Co.* v. *Huffman, supra*,[14] 300, et seq." (Emphasis supplied.)

This Court declined to invalidate the statute which was attacked under the equality clause because it exempted certain labor unions and business corporations from the

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[14] 319 U. S. 293 (1943).

general requirement that labor unions file certain statements.

In the case at bar, the District Court has virtually foreclosed state action in respect to regulations exempting or regulating convexspherical lenses by observing, among other things, that the sale of ready-to-wear convexspherical lenses "doubtless is more perilous" than the acts forbidden by the statute,[15] although the only evidence on the subject is the testimony of plaintiffs' expert to the effect that the sale of such glasses does no harm whatever (R. 101) and the statements of the Attorney General that the exclusion is reasonable (R. 81, 193).

The gratuitous appraisal of the supposed danger in the unrestricted sale of glasses equipped with convexspherical lenses may have been predicated on the decisions in *Roschen* v. *Ward*, 279 U. S. 337 (1929), and *Commonwealth* v. *S. S. Kresge Co.*, 267 Mass. 145, 166 N. E. 558 (1929). Neither decision, however, is determinative of any *facts* whatever relating to the possibility of harm in the sale over the counter of magnifying glasses.

The *Roschen* case affirmed the decision of the District Court in *Kresge* v. *Ottinger*, 29 F. (2d) 762, which involved a motion for a preliminary injunction against the enforcement of a New York statute [16] prohibiting the sale of eyeglasses for the correction of vision unless a physician or optometrist is in charge of the booth where the glasses are sold. The complainants, who were engaged in the sale of ready-to-wear convexspherical glasses, presented no professional testimony or evidence regarding the effect of such eyeglasses on the wearer. They limited their objection to the argument that the regulation had no substantial relation to public health because the specialist required to be present was not obliged to examine or prescribe (p. 765, and 279 U. S. at p. 339). Judge Hand (A. N.) said that this did

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[15] 120 F. Supp. at p. 139.

[16] Ch. 379, Laws of 1928; Education Law, Sec. 1432-a.

not show that the supervision was not a step in the public interest and that, although magnifying spectacles were alleged by the complainants to be harmless, others might not limit their sales to such glasses (pp. 764-765). The case has no bearing on the factual question of whether or not convexspherical lenses are properly classifiable with prescription lenses, or the duplication thereof, from the standpoint of public health. The decision turned solely on the insufficiency of the contention that the regulation was ineffective; the facts regarding convexspherical lenses were not established and were not involved in the result. The same is true of *Commonwealth* v. *Kresge, supra,* which concerned the application of a regulatory law to a defendant who sold "spectacles and eyeglasses designed to fit varying defects of vision" (267 Mass. at p. 147) rather than mere magnifying glasses.

These decisions provide no factual basis for a declaratory judgment holding that the sale of magnifying glasses involves dangers indistinguishable from, or greater than, those incident to the duplication of prescription lenses or their replacement in frames.

One of the reasons advanced by Judge Hand in support of the validity of the restriction placed by the New York statute on the sale of ready-to-wear magnifying glasses was that, if the economic effect of the restriction should be to cause customers to buy prescription glasses instead of the ready made variety, "it cannot be said that the result might not on the whole be desirable * * *" (29 F. (2d) at p. 764). Such reasoning is appropriate when a court seeks to justify the *presence* of a restriction in a statute, but it has no application to the instant case which involves the *absence* of restriction. In weighing the constitutional effect of the *absence* of restriction, it is the function of a federal court to assume that there was a valid reason for the exclusion and to uphold it "if any state of facts reasonably can be conceived to sustain it." *State Board of Tax Commissioners* v. *Jackson* (*supra*), 283 U. S. 527 at p. 537, also citing *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89.

The District Court acted at large in speculating that the distinction drawn by the Oklahoma Legislature was illusory. Speculation as to the purpose of a classification may be indulged in to uphold a statute, but not to defeat it. It is, for example, reasonable to assume that the legislative purpose in regulating the act of fitting prescription glasses to the face and not regulating the *sale* of ready-to-wear magnifying glasses as merchandise *where the selection of the glasses is at the discretion of the purchaser,* was that the person who performs the act of adjusting spectacles to the face of another may hold himself out as possessing technical or professional skill, and the patient should be protected from misrepresentation in that regard, but in the case of self-selected spectacles no person other than the purchaser himself does the fitting and there is no necessity for protecting him from deception on the part of the fitter. This hypothesis is supported by the fact that the statute is so worded that anyone who undertakes to fit *to the face of another person,* ready-to-wear convexspherical glasses sold over the counter, must possess the stipulated qualifications. There is no discrimination under the Act when one person adapts glasses to the face of another, regardless of the type of lens involved; the exemption clause operates only when the purchaser fits magnifying glasses to his own face.

Conclusion

Although the judgment of the District Court should be affirmed, this Court should overrule that part of the opinion below which applies the equal protection clause to the Oklahoma Act.

The statement of the trial court (120 F. Supp. at p. 139) that, if it be desirable for the public protection that opticians sell merchandise and service only upon written prescription, the legislature may not permit the unsupervised sale of ready-to-wear convexspherical eyeglasses, throws doubt upon the validity of the optometry laws of at least 44 states which regulate the practice of visual care but do

not substantially restrict the sale of eyeglasses as merchandise.[17]

The opinion below will, unless expressly disavowed, predetermine actions in state courts involving similar statutes and may destroy the industry of which the *amicus curiae* is a part by engendering arbitrary laws too numerous to be combated by the slow and costly process of interpretive litigation. Unless it is corrected on this appeal, the opinion below will

> "be recorded for a precedent; And many an error, by the same example Will rush into the state."
>
> (*Merchant of Venice*)[18]

Respectfully submitted,

HAMILTON HICKS,
Attorney for PENNSYLVANIA OPTICAL COMPANY as *Amicus Curiae.*

HICKS & WELLER,
Of Counsel.

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[17] For example, the Washington Optometry Law (Laws of 1919, ch. 144, as amended) defines the practice of optometry as "in any manner" adapting lenses "to the human eye for any purpose either directly or indirectly" (Sec. 1) but exempts merchants who sell eyeglasses as merchandise "without pretense of adapting them to the eyes of the purchaser" (Sec. 15).

The Maryland Optometry Law (Ch. 652, Vol. 3, Art. 43, Acts of 1914, as amended) contains somewhat similar provisions in Secs. 358 and 369.

The Virginia Optometry Law (Code of Va. Laws, as amended) prohibits the sale of eyeglasses without prescription (subd. 10 of Sec. 54-396) but permits the "sale of spectacles and eyeglasses * * * as merchandise" in stores (Sec. 54-369).

Note that, in these statutes, the exemption is broader than the clause condemned in the instant case which is limited to ready-to-wear self-selected convexspherical glasses.

[18] See "*Stare Decisis*", by W. O. Douglas, 49 Col. Law Rev. 735 at p. 747.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al., *Appellants*,

v.

LEE OPTICAL OF OKLAHOMA, INC., ET AL.

On Appeal From the District Court of the United States for the Western District of Oklahoma

BRIEF AMICI CURIAE

FOR THE GUILD OF PRESCRIPTION OPTICIANS OF AMERICA, INC.; AMERICAN COMMITTEE ON OPTICS AND VISUAL PHYSIOLOGY; OKLAHOMA CITY ACADEMY OF EYE, EAR, NOSE & THROAT; CALIFORNIA MEDICAL ASSOCIATION; LOS ANGELES SOCIETY OF OPHTHALMOLOGY & OTOLARYNGOLOGY; MEDICAL SOCIETY OF THE STATE OF PENNSYLVANIA, CONSERVATION OF VISION COMMITTEE; NEW JERSEY OPHTHALMOLOGICAL SOCIETY; NORTH CAROLINA EYE, EAR, NOSE & THROAT SOCIETY; PACIFIC COAST OTO-OPHTHALMOLOGICAL SOCIETY; PENNSYLVANIA STATE OPHTHALMOLOGICAL & OTOLARYNGOLOGICAL SOCIETY; PHILADELPHIA COUNTY MEDICAL SOCIETY, CONSERVATION OF VISION COMMITTEE; READING OPHTHALMOLOGICAL SOCIETY; SAN BERNARDINO MEDICAL SOCIETY; SECTION ON OPHTHALMOLOGY, MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA; SOUTH CAROLINA ASSOCIATION OF OPHTHALMOLOGY

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INDEX

Page

The Amici Curiae and Their Interest 1

Statement of Facts 4

Summary of Argument 9

Argument 11

The Legislative Scheme Adopted by Oklahoma, Being Arbitrary, and Unrelated and Unnecessary to the Achievement of the Legitimate End Sought, and Being Predicated Upon an Unconstitutional Delegation of State Power, Imposes Oppressive Conditions on the Rights of Ophthalmologists and Opticians to Pursue Their Lawful Callings, Thereby Denying Property Rights Without Due Process of Law 14

A. The Stated Aim of the Statute 15

B. The Legislative Scheme 15

1. The Prescription 16

2. Responsibility 21

C. Constitutional Infirmities 24

1. A Statute Aimed at Preventing Unqualified Persons from Dispensing Prescription Eyeglasses Which, Instead of Imposing Standards of Personal Qualification, Establishes Oppressive Conditions—Unrelated to the Public Welfare—on the Rights of Ophthalmologists and Opticians to Practice, Denies Due Process 24

2. A Statute Which, Totally Without Standards, Delegates Complete Control of One Occupational Group to Private Persons, Including Many Competitors, Denies Due Process 30

Conclusion 32

TABLE OF CASES

Page

Arkansas State Board of Optometry v. Keller, 218 Ark. 820, 239 S.W. 2d 14 24
Barsky v. Board of Regents of University, 347 U.S. 442 ..... 26, 28, 31
Bolling v. Sharpe, 347 U.S. 497 12
Carter v. Carter Coal Co., 298 U.S. 238 32
Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 ..... 11, 12
Daniel v. Family Security Life Insurance Co., 336 U.S. 220 ..... 11, 12, 25
Day-Brite Lighting v. State of Missouri, 343 U.S. 421 ..... 11, 12
Douglas v. Noble, 261 U.S. 165 ..... 24, 25, 27, 31
Eubank v. Richmond, 226 U.S. 137 32
Kresge Co. v. Ottinger, 29 F. 2d 762 (S.D.N.Y.) affirmed *sub nom.* Roschen v. Ward, 279 U.S. 337 17
Lawton v. Steele, 152 U.S. 133 14
Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 ..... 11, 12
Nashville, Chattanooga & St. Louis Railway v. Walters, 294 U.S. 405 16
New State Ice Co. v. Liebmann, 285 U.S. 262 ..... 28, 29
Palmer v. Smith, 229 N.C. 612, 51 S.E. 2d 8 24
Pierce v. Society of Sisters of Holy Names, 268 U.S. 510 28
Republic Natural Gas Co. v. State of Oklahoma, 334 U.S. 62 14
Roschen v. Ward, 279 U.S. 337 ..... 13, 17, 30
Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 ..... 26, 31
Smith v. Texas, 233 U.S. 630 29
State v. McGrail, 117 W. Va. 51, 183 S.E. 686 23
State v. Rones, 223 La. 839, 67 So. 2d 98 24
State ex rel Booth v. Beck Jewelry Ent., Inc., 220 Ind. 276, 41 N.E. 2d 622 24
Washington ex rel Seattle Title Trust Co. v. Roberge, 278 U.S. 116 32
Wieman v. Updegraff, 344 U.S. 183 15

STATE STATUTES

Page

Arkansas Stat. Ann. § 72-801 (1947) 24
Colorado Rev. Stat. § 102-1-1 (1953) 24
Idaho Code Ann. § 54-1515 (1948) 23
Indiana Stat. Ann. § 63-1004 (Burns 1951) 24
Iowa Code Ann. § 154.9 (1949) 24, 28
Louisiana Rev. Stat. § 1041(3) (1950) 24
Maine Rev. Stat., c. 69, §§ 6(III), (IV) (1954) 23, 24
Montana Rev. Code §§ 66-1302(9), 1316 (1947) 23, 24
New Mexico Stat. Ann. § 51-714 (1941) 23
Ohio Rev. Code § 4725.14 (Page's 1954) 23
Oklahoma Stat. Ann., T. 59, §§ 492, 581, 588 (1951)...8, 16
Oregon Rev. Stat. § 683.010 (1953) 24
South Dakota Code of 1939 § 27.0701 (Supp. 1952).... 24
Tennessee Code of 1938 § 7028 (Michie's) 23
Utah Code Ann. § 58-16-13 (1953) 23
Washington Rev. Code § 1853.040 (1951) 23
West Virginia Code of 1949 § 2931(d) 23
Wyoming Comp. Stat. § 37-1802 (1945) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al., *Appellants*,

v.

LEE OPTICAL OF OKLAHOMA, INC., ET AL.

On Appeal From the District Court of the United States for the Western District of Oklahoma

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BRIEF FOR THE GUILD OF PRESCRIPTION OPTICIANS OF AMERICA, INC., AMERICAN COMMITTEE ON OPTICS AND VISUAL PHYSIOLOGY, OKLAHOMA CITY ACADEMY OF EYE, EAR, NOSE & THROAT, ET AL. AS AMICI CURIAE

THE AMICI CURIAE AND THEIR INTEREST

The Guild of Prescription Opticians of America, Inc., submits this brief amicus curiae with the consent of the parties.

The consent of the attorney for the appellants having been refused, leave to join as amici curiae in the filing of

this brief is being requested by separate motion, filed herewith, on behalf of the following medical and ophthalmological societies:

American Committee on Optics and Visual Physiology
Oklahoma City Academy of Eye, Ear, Nose & Throat
California Medical Association
Los Angeles Society of Ophthalmology & Otolaryngology
Medical Society of the State of Pennsylvania, Conservation of Vision Committee
New Jersey Ophthalmological Society
North Carolina Eye, Ear, Nose & Throat Society
Pacific Coast Oto-Ophthalmological Society
Pennsylvania State Ophthalmological & Otolaryngological Society
Philadelphia County Medical Society, Conservation of Vision Committee
Reading Ophthalmological Society
San Bernardino Medical Society
Section on Ophthalmology, Medical Society of the District of Columbia
South Carolina Association of Ophthalmology

The Guild of Prescription Opticians of America, Inc., a non-profit membership corporation formed under the laws of Pennsylvania, is a national organization representing skilled and ethical dispensing opticians located throughout the United States, including the State of Oklahoma, and Canada. Its purpose and function is to serve the public interest in visual care by the advancement of the science of optics and opticianry, by disseminating information concerning these advances and by the promotion and maintenance of high standards of skill and ethics in the practice of opticianry.

The Guild wholeheartedly endorses state regulation in the field of visual care. It has for many years actively cooperated with the medical profession and state officials

to that end. It believes, however, that Section 2 of Enrolled House Bill 953, enacted by the Legislature of Oklahoma in 1953, establishes a regulatory system unique among the 48 states which bears no relation to the improvement of visual care; to the contrary, by arbitrarily burdening the practice of ophthalmology and opticianry, it is detrimental to the public welfare. It represents retrogression and not progress.

The American Committee on Optics and Visual Physiology is composed of representatives from the Section on Opthalmology, American Medical Association, the American Ophthalmological Society, the American Academy of Ophthalmology and Otolaryngology, and the Association for Research in Ophthalmology. It represents virtually all qualified licensed ophthalmologists throughout the United States. Its purpose and function is to promote the public interest in visual care by coordinating and disseminating information on matters of significance in the science and profession of ophthalmology, and by maintaining the highest professional ethical standards.

The medical and ophthalmological societies listed above represent qualified licensed physicians and ophthalmologists in their respective geographical areas. The Oklahoma City Academy of Eye, Ear, Nos & Throat states:

> The Oklahoma City Academy of E.E.N.T. is the only Ophthalmological Society in the State and is made up of members both in and out of Oklahoma City. It is our belief that it represents the opinion of the State ophthalmologists.

The American Committee on Optics and Visual Physiology and the medical and ophthalmological societies which have joined with it firmly support state regulation of the field of visual care. They endorse in general the aim of the Legislature of the State of Oklahoma. They object, however, to the manner in which Section 2, under the guise of promoting the public health and welfare but in fact to the detriment of the medical profession, has

advanced not the public's interest in eyesight, but the economic interest of the optometrist.

These Amici take sharp issue with the Attorney General of Oklahoma when he implies that Section 2 has no significant effect upon ethical practitioners (Br. p. 32-33), and therefore urge affirmance of the judgment below in order that this Section will be stricken from the statutes of Oklahoma and may not become a pattern for legislation in other states.

STATEMENT OF FACTS

The three judge district court below held unconstitutional portions of Sections 2, 3 and 4 of Enrolled House Bill 953 (R. 27-28). These Amici file this brief with respect to Section 2 which was unanimously found to violate rights protected by the Fourteenth Amendment. Circuit Judge Murrah, while dissenting as to Sections 3 and 4, expressed the firm opinion that the unconstitutionality of Section 2 was "clear" (R. 63-64, 68).

The judgment below does not affect the continuing prohibition against any person other than a licensed ophthalmologist or optometrist examining or refracting eyes or prescribing corrective lenses. Rather it is effective solely to eliminate the new prohibitions that an optician may not, without prescription, transfer lenses from one frame to another, duplicate—by means of a lensometer—lenses previously prescribed by licensed examiners, or make any repairs to eyeglasses which require fitting or adapting the frames to the face of the wearer. This holding reflects the following facts of record concerning the three main groups in the field of visual care—the ophthalmologist, the optician and the optometrist—and their interrelationships (R. 37, 41-42).[1]

Ophthalmology is the medical science and profession devoted to the examination, diagnosis and treatment of

[1] The opinion of the court below (R. 36-62) constitutes its findings of fact and conclusions of law (R. 27).

all diseases of the eye, including the refraction or measurement of a patient's visual power and the issuance of prescriptions for corrective lenses. The ophthalmologist is a doctor of medicine qualified by specialized training and experience, and by statute, to treat by means of medicine, surgery and refractive procedures any and all disorders and malfunctions of the human eye. The ophthalmologist, sometimes known as an oculist, is the eye physician. He is the ultimate specialist—the only man whose judgment can be accepted as definitive in many ocular conditions (R. 37, 41-42; 90-92, 293, 333).

If examination reveals the existence of refractive error in the eyes of the patient, the ophthalmologist prepares a prescription (R. 91). Most prescriptions contain only data relating to the strength of the correcting lenses (R. 367). "The evidence indicates, almost without variance, that written prescriptions . . . contain no directive data in regard to the manner in which the spectacles are to be fitted to the face of the wearer" (R. 45). Prescriptions for fitting, adjusting and adapting frames are impossible or impractical to write (R. 101). Such fitting and adjusting can be accomplished only after the patient has selected the frames he desires and his individual requirements have been determined. (R. 367-371, 373).

Since ophthalmologists commonly do not fill their own prescriptions (R. 96, 334, 342-343),[2] they give the prescription to the patient to be filled by any optician he chooses (R. 91). It is considered improper for an ophthalmologist to specify a particular optician (R. 305). However, he may recommend several competent opticians (R. 91, 229, 304-305). A minority of ophthalmologists request the patient to return for a check of the accuracy with which the original prescription has been filled (R. 48-49). In such in-

[2] An ophthalmologist practicing in the smaller towns where no optician is available must of necessity perform the optician's functions (R. 96-97). There may also be exceptions for other reasons (R. 163-164).

stances, a clerk in his office performs this function with a lensometer (R. 49).

The optician is the "right arm" of the ophthalmologist and bears the same relationship to him as the pharmacist to the general medical practitioner (R. 97). He interprets the ophthalmologist's prescription, measures the patient's relevant features, administrates the grinding of the lenses and their insertion in frames of the patient's choosing and adapts or fits the frames to the face of the patient. A correlative function of the optician lies in replacement: if lenses, otherwise satisfactory, are broken but a sufficient fragment remains, the optician duplicates them by means of the lensometer—invented by opticians (R. 343)—the same precision instrument he uses in verifying the lenses originally prescribed; if a person wearing glasses is comfortable with his lenses but desires duplicate or different frames, the optician duplicates or transfers the lenses and fits such frames. Finally, he also repairs and adjusts eyeglasses to the face (R. 37, 97-99, 117, 268-269, 276-277, 313-314, 368-376). In the performance of these functions, the optician must possess artisan skill related to the science of optics and knowledge of optical terms (R. 37, 45, 47). The court below found, as the evidence established, that the ophthalmologist and optometrist "possess no knowledge or skill superior to a qualified practicing optician insofar as the artisan tasks in view are concerned, and in fact the two professional groups, as a class, are not as well qualified as opticians as a class to either supervise or perform the services here regulated" (R. 51, 98-99, 164).[3]

The optician, however, is more than an artisan. He is also engaged in the sale of lenses and frames (R. 37, 42, 45). He, like most optometrists, maintains a complete stock of frames from which the customers may make selections; these frames vary in size, shape, color and

[3] This finding was abundantly supported by the uncontradicted testimony of the foremost ophthalmologists in the country (R. 90, 266-267, 275, 309-310, 337-338, 366-367, 402-406).

adornment (R. 37). The profit from the sale of lenses is relatively small compared to the profit from the sale of frames (R. 197). Between 60 and 75 percent of an optician's gross income is derived from the sale of frames (R. 196-198, 206). Charges are not made for adjustments and minor repairs (R. 134).

The optometrist renders an integrated eye service. He refracts eyes by non-medical means (R. 37). He may not employ drops as an aid in refraction. He is not a physician or medical doctor and is prohibited from diagnosing and treating diseases of the eye. The optometrist renders optical dispensing services to his patients and sells frames, lenses and eyeglasses, both original and replacement (R. 37, 42). Optometrists do not issue prescriptions to their patients except in rare instances (R. 117, 133, 158, 253, 381). The rarity of this is illustrated by the testimony of an optician that in three and one-half years he has filled "not more than three" optometrists' prescriptions (R. 133); and by the testimony of an optometrist that "the only time" he will issue a prescription to a patient is when he is "leaving town" (R. 253). As stated by the amicus American Optometric Association, Inc., "optometrists do not refer their patients to opticians" (Br. p. 27; R. 11).

Since the optometrist fills all of his own prescriptions (R. 45), his patient does not patronize opticians: a person whose eyes are refracted by an optometrist must purchase the original eyeglasses from him and have them fitted by him (R. 133-134, 158, 252, 381). The major portion of the optometrist's income is derived from the sale of the lenses and frames (R. 133-134, 160).

In the field of original eyeglasses, the optician must look to the patients of ophthalmologists for his customers. These represent as much as 40% of the eyeglass wearing public. The optometrists examine and dispense for the remaining 60% (R. 45). As a necessary consequence, anything which causes an ophthalmologist to reduce the number of refractions he performs or the number of prescriptions he issues automatically reduces the optician's busi-

ness (R. 381). In the field of replacement eyeglasses, the patients of both ophthalmologists and optometrists have been able to patronize the optician without prescriptions. Sales to these persons without prescription account for a substantial percentage of opticians' income—variously estimated from 25% to 50% (R. 166, 196-198, 206). Income from this source is so significant that an ethical optician of vast experience testified that if it were lost (R. 166):

> I think it would break most dispensing opticians . . . My own business and that of every dispensing optician would drop at least forty to fifty percent.

Against this factual background, the State of Oklahoma enacted Enrolled House Bill 953. Previously, the State had by appropriate legislation restricted the refraction of eyes to licensed ophthalmologists and optometrists. No others could prescribe corrective lenses for refractive error. 59 Okla. Stat. Ann. §§ 492, 581 (1951). The State had never passed legislation designed to regulate the practice of opticianry by prescribing standards, licensing or otherwise (Br. for Appellants, p. 13). Instead, the Legislature enacted Section 2 which makes it unlawful for any person, other than a licensed physician or optometrist (full text in Appendix),

> "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or
>
> to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses . . .
>
> to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section,"

except as "any optical supplier" may be authorized by written prescription, or its duplicate, from an Oklahoma licensed physician or optometrist,

> "provided, however, that the physician or optometrist writing such prescription shall remain responsible for

> the full effect of the appliances so furnished by such other person."

and

> "Provided that this Section shall not prevent a qualified person from making repairs to eye glasses."

SUMMARY OF ARGUMENT

The Oklahoma statute seeks to promote visual care by preventing unqualified persons from correcting the eyes of others. Section 2, unlike the law of any other jurisdiction, undertakes to achieve this aim not by licensing the only unlicensed group involved but by conditioning the dispensing and sale of optical goods on two interrelated provisions: (1) It requires a prescription from a licensed ophthalmologist or optometrist before any function relating to eyeglasses may be performed by an optician, and (2) it places responsibility upon the prescribing practitioner for the full effect of the eyeglasses furnished by the optician.

The prescription, of course, has long been required in Oklahoma as elsewhere to provide the formuli of new lenses. Therefore, such requirement is significant to this case only in the market for replacement needs: the prescription is made a prerequisite to such subsidiary needs of the wearers of eyeglasses as buying new frames for use with old or duplicate lenses, replacing broken lenses, and anything else requiring adjustment or fitting of frames to the face. But the prescription rarely can or does contain data regarding the fitting and adapting of lenses and frames; lenses may be accurately duplicated without prescription by use of the precision lensometer; and any prescription may continue to be dispensed by anyone in the State "whether skilled or unskilled in the trade or occupation of an optician, and regardless of his educational requirements or moral character."

The responsibility provision is significant only to the ophthalmologist. Optometrists always fill their own pre-

scriptions and neither release nor are by statute required to release them to their patients to enable them to go elsewhere for original or replacement needs. On the other hand, the ophthalmologist being a professional specialist does not engage in dispensing. He is therefore dependent upon the optician—the specialist dispenser. Under the statute as interpreted by the Attorney General, however, the ophthalmologist cannot supervise his responsibility for the optician's performance. He cannot select the optician to whom the patient must take his prescription; his prescription may be transferred freely from one optician to another; and he cannot compel the patient to return for checking. All that the statute does is shift to the ophthalmologist responsibility for the full effect of the work of any optician, known or unknown, qualified or unqualified, to whom the prescription may be taken or transferred.

Not only, then, does Section 2 employ means unrelated to the statute's aim of preventing unqualified persons from participating in visual care, but it imposes conditions and limitations on the practices of ophthalmology and opticianry which—as forbidden by this Court—are unrelated to personal qualifications. The ophthalmologist's practice is conditioned upon assumption of an onerous and uncontrollable responsibility. The optician's practice is conditioned upon a prescription-license (1) which an optometrist will not issue and which the statute does not require him to issue, (2) which an ophthalmologist is oppressively discouraged from issuing and (3) which, even if issued, the optician cannot hold himself out as qualified to receive. The only result of these conditions and limitations is that the optometrist, by not issuing prescriptions, now gains by statutory leverage a stranglehold on the replacement needs of persons whose eyes he refracts. In addition, the onerous conditions on the practice of the ophthalmologist and the optician have the practical effect of continuously channeling to the optometrist the patients of those specialists. The inevitable thrust of the statute is optometric monopoly of both refracting and dispensing.

If Section 2 could be construed to permit the licensed practitioner to discharge his responsibility of supervision, so that he could freely issue prescription-licenses and fully control the opticians who dispense them, complete control of opticians would thus be delegated to private persons, including many competitors, without statutory standards, and without appeal or review. Such power not only to establish private and subjective standards for opticians but also to determine which opticians meeting those standards may remain in business would amount to an unconstitutional delegation of power long forbidden by this Court.

ARGUMENT

In urging affirmance of a judgment declaring a state statute unconstitutional, these Amici are well aware—as was the court below (R. 39-40, 63-64)—that this Court has adopted and adhered in recent years to an extremely broad view of the constitutional area within which state legislatures may act. This Court will not, under the due process clause of the Fourteenth Amendment, "sit as a super-legislature to weigh the wisdom of legislation," *Day-Brite Lighting* v. *State of Missouri*, 343 U.S. 421, 423, nor does it deem itself "equipped to decide desirability." *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 224. "Within the area of constitutionality, the states should not be restrained from devising experiments," *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541, 551, and "the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-537.

But the judicial abstention and deference to state legislatures which these pronouncements reflect are not, as appellants and their amici contend, to be equated with judicial abdication. "[O]bjections which go to constitu-

tionality" are still the concern of this Court. *Cohen* v. *Beneficial Industrial Loan Corporation, supra,* at 550. States may exercise their control within wide latitude only "so long as specific constitutional prohibitions are not violated." *Day-Brite Lighting* v. *State of Missouri, supra,* at 423; *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co., supra.* The manner in which a legislature exercises its power must be "reasonably related" to a proper governmental objective. *Bolling* v. *Sharpe,* 347 U.S. 497, 500. A statute which "has no relation to the elimination of those evils" a state may wish to combat "cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them,' " even though "unreasonable" and "arbitrary" are now to be more strictly construed than when that rule was first formulated. *Daniel* v. *Family Security Life Insurance Co., supra,* at 224-225.

In the light of these principles governing review, and in order to set the case in proper perspective, these Amici not only readily concede, but endorse, the following propositions:[4]

1. The field of visual care is a proper area within which a state may legislate.
2. Practitioners in the field—ophthalmologists, opticians and optometrists—may all properly be regulated, compelled to adhere to standards, and licensed.
3. Eye examinations should be restricted to duly licensed ophthalmologists and optometrists.
4. Prescriptions from licensed ophthalmologists and optometrists should be required before opticians may

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[4] This position is identical with that of the Attorney General of California as set forth in his *amicus* brief. These Amici do not, however, share his belief that the decision below may in any way be construed as holding that the activity of adapting lenses and frames to the face cannot be regulated in the public interest. See R. 49.

dispense new—as distinguished from duplicate—lenses.

5. Responsibility may properly be imposed on each of the above groups for the carrying out of its individual functions.

The contention of these Amici, however, is that Oklahoma, in venturing into a field properly subservient to the exercise of its police power and with a proper and desirable purpose, has run afoul of the due process requirements of the Fourteenth Amendment, not "because it might have gone farther than it did, or because it may not succeed in bringing about the result" that it purports to produce, *Roschen* v. *Ward*, 279 U. S. 337, 339, but because the means adopted (1) are wholly unrelated to the end sought, (2) involve an unconstitutional delegation of power, devoid of standards, not to members of an administrative board or tribunal but to private persons including competitors, and (3) will tend and succeed, all to the economic advantage of optometrists, only in oppressively discriminating against ophthalmologists and opticians, thereby obstructing and diminishing the public health, safety and welfare. And the arbitrariness of the means employed by Oklahoma are especially emphasized by the acknowledged existence of alternative means, of demonstrated merit and effectiveness in all walks and areas of business, industrial and professional life—including the field of visual care[5]—which are undeniably capable of achieving all that the Oklahoma legislature desires without infringing upon centuries-old rights and liberties of the profession of medicine and the art of opticianry.

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[5] See, for example, the *amicus* brief of the Attorney General of California setting forth that state's system for licensing dispensing opticians. At least eleven other states similarly regulate opticians by licensing: Alabama, Connecticut, Florida, Kentucky, Nevada, New Jersey, New York, North Carolina, South Carolina, Virginia and Wisconsin. As demonstrated by the dates of enactment—five being within the past four years—the modern trend is in this direction.

THE LEGISLATIVE SCHEME ADOPTED BY OKLAHOMA, BEING ARBITRARY, AND UNRELATED AND UNNECESSARY TO THE ACHIEVEMENT OF THE LEGITIMATE END SOUGHT, AND BEING PREDICATED UPON AN UNCONSTITUTIONAL DELEGATION OF STATE POWER, IMPOSES OPPRESSIVE CONDITIONS ON THE RIGHTS OF OPHTHALMOLOGISTS AND OPTICIANS TO PURSUE THEIR LAWFUL CALLINGS, THEREBY DENYING PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW.

Acknowledging and endorsing the vital interest of the public and the power of the state in regulation of the field of human eyesight and visual care, these Amici's intimate relationship to and knowledge of that field has led them to challenge the manner of "regulation" adopted by the State of Oklahoma. Measuring the means adopted by the legislature against the end it seeks to achieve is a yardstick of constitutionality which this Court has consistently applied:

> . . . To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; *and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.* The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. . . . *Lawton* v. *Steele*, 152 U. S. 133, 136-137 (emphasis added).

While the application of this rule in recent years has been conditioned by greater tolerance for the legislative judgment, nevertheless "the Amendment has been effective to create substantial limitations upon the methods by which the changes deemed necessary may be made." Mr. Justice Rutledge dissenting in *Republic Natural Gas Co.* v. *State of Oklahoma*, 334 U. S. 62, 90, in voting to sustain the constitutionality of state action. Upon this principle, this Court only recently held unanimously that regardless of whether or not a constitutionally protected right to public

employment existed, "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman* v. *Updegraff*, 344 U. S. 183, 192. An analysis of Section 2 of the Oklahoma statute demonstrates that the means employed, instead of tending to achieve the avowed end sought by the legislature, can only succeed in arbitrarily benefitting the integrated practitioner at the expense of the specialist groups in the field of visual care.

A. The Stated Aim of the Statute.

The acknowledged and legitimate purpose of Section 2 of the Oklahoma Act is to advance the public interest in visual care by insuring quality, regulation and maintenance of standards in the dispensing and sale of optical goods. The policy of the law is thus stated in its opening section:

> SECTION 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another.

As expressed by the Attorney General of Oklahoma in his brief, the object is to "govern all persons, trades or professions that may be involved in the sale of corrective optical goods or eyeglasses to the people of Oklahoma" (Br. p. 39; R. 76). According to the amicus American Optometric Association, Inc., the purpose is to "make sure that the optician's services are dispensed in the public interest" (Br. p. 27).

B. The Legislative Scheme.

The vice of the Oklahoma legislation here in issue is hidden by the initial plausibility of its method: a statute

loftily aimed at the promotion of visual care undertakes so to do by the apparently innocent and reasonable avenues of (1) requiring prescriptions from licensed eye practitioners before any function relating to eyeglasses may be performed, and (2) placing responsibility on licensed eye practitioners for the full effect of the eyeglasses furnished pursuant to their prescriptions—a device respectably characterized by the Attorney General as "professional responsibility" (Br. p. 5). When read or said quickly, these provisions sound fine. Upon reflection and a look at undisputed facts, however, the sound changes. An examination into the facts of the field being regulated is essential when the constitutionality of legislation is at issue. "A statute valid as to one set of facts may be invalid as to another." *Nashville, Chattanooga & St. Louis Railway* v. *Walters*, 294 U. S. 405, 415.

1. The Prescription.

In the original equipment market, i.e. new lenses, it is of course the unvarying practice and law that persons who do not already wear eyeglasses, or who wish to have inadequate lenses changed, do not and cannot become customers of opticians without first, as patients, having their eyes examined by a licensed practitioner and receiving a prescription for new lenses. The reason is simple: ophthalmic lenses must be prescribed according to the individual quality and needs of the patient's eye—characteristics ascertainable only by refraction. For an unlicensed person to dispense new lenses without such refraction and prescription has long been prohibited in Oklahoma, and throughout the United States, as the unlawful practice of optometry. 59 Okla. Stat. Ann. §§ 581, 588.[6] Prescrip-

[6] Because the requirement of prescriptions for new lenses has never been questioned anywhere and has nothing to do with this case, the complaint of amicus American Optometric Association, Inc., that the court below "completely disregarded the much more important application of [Section 2 which] prevents the illegal practice of optometry" (Br. p. 16, n. 8) is without merit.

tions, or lenses already prepared in accordance therewith, have thus always been a *sine qua non* to an optician's entry into the eye picture. In addition, some states have extended this principle to require professional examination or supervision before any lenses, ready-to-wear as well as ophthalmic, may be sold. *Roschen* v. *Ward*, 279 U. S. 337, so heavily relied upon by the appellants, did no more than sustain the constitutionality of such a statute.[7]

The entire assault on Section 2 is, in this Court as in the court below, directed solely at the requirement of physical possession of a prescription in the replacement or after market:[8] where customers whose eye examination needs and visual problems have already been satisfied but whose merchandising needs, or physical accommodations of frames to the face, are paramount. It is in this area that the statute, uniquely, has demanded a prescription for an optician, but not the competing optometrist, to fill such familiar subsidiary needs of eyeglass wearers as:

1. Replacing of broken lenses;

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[7] The New York statute upheld in *Roschen* v. *Ward* provided that:

> Nothing in this article shall be construed to apply to . . . persons who sell spectacles, eyeglasses or lenses only on prescription from such physicians or from such duly qualified optometrists or who duplicate broken lenses. 29 F. 2d 762.

[8] The law would thus be violated if the prescription was telephoned. This was clearly demonstrated in the following colloquy between court and counsel below:

> Judge Vaught: I don't care to inject any new evidence, but two years ago, for instance, I was holding court in Enid. I dropped my glasses, broke a lens. I couldn't see. You know, if a judge can't see, he is as bad off as a lawyer that can't see. I went into an optician there, office there at Enid. I told him who had made my glasses, who the doctor was and who the optician was. He says, "You just leave them here." He called the optician and got the prescription. Now would you say that that was a violation of the Act?
>
> Mr. Hansen: I think that he would have to have the prescription or a duplicate of the prescription on file with him before he could do it, yes, sir . . . (R. 185).

2. Placing of old lenses in new frames where old frames have broken or become outmoded;

3. Purchasing a second, duplicate pair of eyeglasses to match those already being used;

4. Having uncomfortable frames refitted, by bending and adjustment, "to the face";

5. Any other repair requiring the fitting of eyeglasses "to the face" (R. 189).

As any wearer of eyeglasses readily knows, practically no function—with the possible exception of replacing a hinge screw—can competently and completely be performed by an optician without thereafter placing the frame on the face and adapting it to a comfortable fit. Yet all these functions are henceforth prohibited to the optician, and channeled to the optometrist, unless the customer has a prescription. This means that optometric patients, who cannot obtain release of their prescriptions, and those ophthalmological patients who, when the need arises, do not have their prescriptions with them, are no longer free to patronize the optician. The extent of the statute was strikingly illustrated by the following colloquy between court and counsel:

> Judge Murrah: Well, suppose I break this, what do I want to say—
> Mr. Woods: Temple piece.
> Judge Murrah: Temple piece. Suppose I break the temple piece and I take it, could he replace the temple piece and adjust it so that it would fit comfortably?
> Mr. Hansen: I have doubt upon that; I have doubt upon that (R. 191-192).

A prescription, almost uniformly, contains solely the eye examiner's formuli indicating the power and axis of lenses required. The court below found that virtually no prescription contains directive data respecting the fitting of frames to the face. Moreover, the evidence conclusively

established that prescriptions are not capable of communicating how such functions should be performed. This is a matter of artisan skill to be adapted, by touch and by sight, to each individual problem. Cognizant of the contents of the usual prescription, counsel for the State conceded below that the statute imposed no requirement which would, or could, require more detailed specification as to the adapting and fitting of lenses and frames to the patient's face (R. 183-187).[9] Despite this concession, the Attorney General advances in this Court a list of reasons which, under his theory of the case, justify the constitutional validity of the prescription as a prerequisite to performance by the optician—but not the optometrist—of every function in the replacement field (Br. pp. 34-36). These reasons, however, are confined to but a small portion of the optician's replacement functions and, if consequential, would apply equally to the optometrist who may perform the identical functions without the prescription. For example, in the post-operative lens distance items, the optometrist without the prescription is in no better position to know what the eye-surgeon prescribed than is the dispensing optician. But the real answer to these strained and overlapping points is that they are gleaned from isolated bits of testimony concerning rare and unusual situations and are directly in conflict with the findings of fact of the court below (R. 45, 47). Significant in this connection is

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[9] "Judge Murrah: Can he do anything except that which is set forth?

Mr. Hansen: He must follow the prescription. He must not depart from the prescription, but things not covered by the prescription, why of course he can go ahead and do. That's why the Legislature made them responsible for the acts of the persons when they turned that over, if they didn't give sufficient definite instruction for him to do it and something wrong happened, if there is a liability which would arise under the statute, he would be responsible. He could have gone further; he didn't go further, but he must write the prescription, it must have the measurement. The other things, we don't think it would be necessary. We think that is up to the physician or the optometrist. We do not think he needs to go further (R. 184)."

the statement of the Attorney General of California in his amicus brief:

> Under California law the registered dispensing optician may use his skill and judgment in adapting the lenses to the eye. The law does not require and the prescription rarely provides any specifications regarding the adaptation of the lenses and frames to the eye.
>
> * * * * *
>
> The duplication of the lens is a mechanical shop operation. The adaptation of the lenses and frame to the eye is an activity in the pursuit of a calling involving personal contact with the patient. Proper performance of the function requires skill and judgment and additionally so because the prescription does not specify any particulars regarding the adaptation (Br. pp. 5, 11-12).

Having established the prescription as prerequisite to patronizing an "optical supplier"[10] in the replacement or after market, the legislature chose not to define that term. More important it made no effort to erect or define standards or qualifications for optical suppliers. In fact Oklahoma frankly announces to this Court

> That the Legislature of Oklahoma has never enacted a statute which requires an *optician of this State*, before he is entitled to practice his trade or occupation therein, to possess prescribed educational qualifications or be of good moral character, or to pass a required examination and procure a license as a qualified optician, *hence any person in this State, whether skilled or unskilled in the trade or occupation of an optician, and regardless of his educational requirements or moral character, may operate as an optician in this State*. . . . (Br. p. 13) (second emphasis added).

The State's position as to who may be qualified under the new Act was clearly spelled out in reply to a question from the court below in regard to the repair provision:

[10] The State conceded that this term includes dispensing opticians (R. 235).

> Judge Vaught: What do you understand by "qualified person"?
>
> Mr. Hansen: I think any person who purports and claims to be qualified. I think all the opticians would say they are qualified. I think other persons who may not hold themselves out to be opticians, I think you could go into a jewelry and anybody that would want to take on the duty of repairing those glasses, even though he wasn't an optician, I think he could do that. I think I could do it, even though I would charge compensation for it, because as long as the statute doesn't go ahead and prescribe what the qualifications are, of this repair are, I think we could assume that it would be— (R. 186).

In other words, a lawyer, a plumber, a housewife, an optician—may lawfully be an "optical supplier." No one of these, however, may "represent or hold himself out to the public as being qualified to do any of the acts listed in this Section," according to the express language of Section 2.

2. Responsibility.

With the prescription thus demanded as a customer's ticket of admission to the place of business of every "optical supplier," except an optometrist, the statute proceeds ostensibly to regulate such suppliers by establishing "responsibility" for the work they perform. The responsibility, however, is placed *not* on the supplier optician but on the eye examiner whose prescription "such other person" fills. Factual analysis of the medical and optometric context within which this responsibility operates is essential to an understanding of its significance.

This provision has no practical application on optometrists. They do not refer their patients to opticians. As an integrated examiner-merchant, the optometrist sells both his services and the merchandise such services lead to. He is liable to be sure, as are all men, to the extent imposed by the common law for personal acts or omissions. But since he rarely issues a prescription, the optometrist

as a matter of fact will never be shouldered with the statutory responsibility for the deeds of others.

The effect on physicians is quite the contrary. Ophthalmologists and oculists write prescriptions but rarely fill them or provide the glasses. These medical men specializing in the realm of the eye render strictly professional service. The dispensing of optical goods, and the services related to their application to the wearer's face, are performed for patients of ophthalmologists by the optician. Thus, unlike that of the optometrist, completion of the process commenced by the ophthalmologist's refraction is wholly dependent on the skilled performance of others. And the practical operation of the statutory provision for responsibility is to make the ophthalmologist who releases a prescription an insurer of the quality of its dispensing by others in both the original and replacement fields.

Despite the fact that he is responsible, however, the ophthalmologist cannot dictate or compel his patient to patronize any particular optical dispenser. As stated by counsel for the State at trial,

> It must not be directed to any specific optician. It may be given to the patient. He can take it to the optician of his choice . . . with the responsibility, however, for the full effect of any appliances furnished remaining with the doctor (R. 83).

The complete lack of control of the ophthalmologist over the optician who fills his prescription is effectively illustrated by the fact that the Act sanctions transfer of a prescription from one optician to another, without approval of the author (Br. for Appellants, pp. 31-32).

Moreover, the ophthalmologist cannot compel the totally unregulated "optical supplier" whom his patient may patronize to fill the prescription in the designated fashion. Nor can he compel, though he may surely so suggest, the patient to return with his new, duplicate, or otherwise repaired eyeglasses for a check up. In other words, the provision makes the ophthalmologist legally liable for the acts

of unknown other persons, who are neither defined nor regulated by the State, nor are subject to any effective control or regulation by the ophthalmologist himself.

The only conceivable manner in which ophthalmologists could exercise a degree of control commensurate with their responsibility under Section 2 lies in construing that provision as authority to dictate, and by some arbitrary means eliminate, their patients' choice of optical supplier, and to compel them to return for a check up. Perhaps this could be achieved if the ophthalmologist, instead of handing the prescription to his patient, sent it direct to a selected supplier with orders to prepare the glasses, fit them to the patient, but thereafter return them, together with the prescription, for checking prior to release to the patient. Such intolerable interference with the public's free choice in the market for optical goods, however, was expressly renounced by the Attorney General of Oklahoma in the court below (R. 82-83).

The prescription-responsibility method of regulation established by Section 2 is without parallel.[11]

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[11] The unique character of the prescription-responsibility scheme of Section 2 is spotlighted by its comparison with the assertedly "similar legislation" of the states listed by the amicus American Optical Association, Inc. (Brief, pp. 28-29). A brief analysis of these 17 "duplication" states and 12 "definition" states discloses that, eliminating overlapping, they embrace a total of but 22 states of which none has either (1) a responsibility provision or (2) a prescription provision in any way comparable in scope with that of Section 2.

Instead, these 22 states are composed of (1) 5 which expressly license opticians to perform their traditional functions, i.e. California, Florida, Nevada, North Carolina and Virginia; (2) 7 others which specifically exempt from their optometry laws opticians or persons who sell eyeglasses or lenses but who do not attempt to adapt them "to the eye" (illegal practice of optometry), i.e. Idaho (§ 54-1515), Montana (§ 66-1316), New Mexico (§ 51-714), Ohio (Page's Rev. Code 1954, § 4725.14), Utah (§ 58-16-13), Washington (Rev. Code 1951, § 1853.040), and Wyoming (§ 37-1802); (3) 3 others which specifically exempt opticians or persons who only do mechanical work on lenses, frames or the fitting thereof, i.e. Tennessee (§ 7028), West Virginia (Code of 1949, § 2931(d), *State* v. *McGrail*, 117 W.Va. 51, 183 S.E. 686), and Maine

C. Constitutional Infirmities.

1. A Statute Aimed at Preventing Unqualified Persons From Dispensing Prescription Eyeglasses Which, Instead of Imposing Standards of Personal Qualification, Establishes Oppressive Conditions—Unrelated to the Public Welfare—On the Rights of Ophthalmologists and Opticians to Practice, Denies Due Process.

This Court, in an unanimous opinion delivered by Mr. Justice Brandeis, sustained in *Douglas* v. *Noble*, 261 U. S. 165, a statute regulating the practice of dentistry. It did so despite the strenuous contentions of unlicensed persons that the statute purported to confer upon a board of examiners arbitrary power to grant or withhold licenses. The basis of the Court's ruling was that, reasonably construed, the statute did not authorize the board to be arbitrary and appropriate review of the board's conduct was available. Such decision was well in accord with the time-honored doctrine that the judiciary must "decline to give the statute a construction which would render it void, unless compelled to do so by unequivocal language in the act." Simul-

(§ 6(IV)); see also Montana (§ 66-1302(9)); (4) 6 others whose definition of optometry, by statute or judicial construction, contains nothing about fitting or adjusting lenses or frames to the face, i.e. Arkansas (§ 72-801, see *Ark. St. Bd. of Optom.* v. *Keller*, 218 Ark. 820, 239 S.W. 2d 14), Colorado (Rev. Stat. 1953, § 102-1-1), Iowa (§ 154.9), Louisiana (§ 1041(3), see *State* v. *Rones*, 223 La. 839, 67 So. 2d 98), Oregon (Rev. Stats. 1953 § 683.010) and South Dakota (§ 27.0701), and (5) one other state whose definition of optometry to embrace examining *and* fitting has been construed to exclude opticians, whose only function is fitting, i.e. Indiana (§ 63-1004, see *State ex rel Booth* v. *Beck Jewelry Ent. Inc.*, 220 Ind. 276, 41 N.E. 2d 622); see also Maine (§6(III)). The Iowa statute cited above contains no requirement of a prescription as prerequisite to duplicating and, moreover, requires that the optometrist give each patient his prescription. In addition, no state has, in the face of direct challenge by opticians, sustained a statute requiring prescriptions for duplicate lenses. The Supreme Court of North Carolina held such requirement unconstitutional in *Palmer* v. *Smith*, 229 N.C. 612, 51 S.E. 2d 8.

taneously, however, this Court reiterated the test, applicable to the statute at bar, that:

> If it purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practise dentistry, the statute would, of course, violate the due process clause of the 14th Amendment. 261 U. S. at 168.

Under the decision in *Douglas* v. *Noble* and the subsequent consistent rulings of this Court, the State of Oklahoma was afforded a wide range within which it might legislate to promote the interest of the public in visual care, subject only to the prohibition against unrelated conditions. Counsel for the State recognized the range, though not its limitation, in the court below. As he stated:

> the Legislature could have done one of two things, in my opinion. They could have either passed a licensing bill where these opticians would be examined and licensed and regulated by a board, in which case they might not need this provision where they must operate under the care and supervision of a professional man; or the Legislature could have done as it did and put these nonprofessional people, dealing with public vision, put them under the supervision of the professional man who makes the examination and who is responsible for his patient's eyesight. That is all this law does (R. 80).[12]

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[12] Although the pressures on a legislature are irrelevant "in testing constitutionality," *Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, 224, they way occasionally shed light when the reasons for the legislative method, rather than subject, are obscure:

> Two things we do not want. First, we do not want to have our present law amended. Second, we do not want the dispensing opticians licensed to practice. (Letter from representative of Oklahoma Optometric Association, Plaintiff's Exhibit 2, R. 459-460).

It was in light of this atmosphere that the statement in the text was immediately followed by this interesting colloquy with the court:

> Judge Vaught: You conclude then because the optician is

But under the alternative adopted by Oklahoma, as forthrightly confessed to this Court by its Attorney General (Br. p. 13), no Oklahoma optician, as prerequisite to engaging in his trade or occupation, need

> possess prescribed educational qualifications or be of good moral character, or to pass a required examination and procure a license as a qualified optician.

Rather,

> *any person in this State, whether skilled or unskilled in the trade or occupation of an optician, and regardless of his educational requirements or moral character, may operate as an optician in this State* (emphasis added).

The impact of the Attorney General's statement is clear. The statute, designed to assure the people of Oklahoma that "no unqualified person" shall correct their eyes—following refraction by a licensed practitioner—by improperly dispensing lenses and frames, leaves the dispensing of lenses and frames in the hands of "any person who purports and claims to be qualified" (R. 186), so long as he has physical possession of a prescription. This, then, is not a case where "a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing." *Barsky* v. *Board of Regents of University*, 347 U. S. 442, 451; *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608. It does not reach licensing. It does not establish or maintain in any way any standards whatever. The means employed by this

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not licensed the same as the optometrist, that he should not be permitted to exercise this particular function?

Mr. Daugherty: I don't say that, sir. I say the Legislature had two things it could have done with the same result, and it has gone this way, which we feel gets the job done, the main purpose being to see that the people get professional care for their eyes.

Judge Vaught: Well, sometimes that's the object of a law, and sometimes it's to assist another class.

Mr. Daugherty: Yes, sir (R. 80-81).

unique system to eliminate the unqualified optician have, by concession, nothing whatever to do with personal qualifications to practice.

Instead, under the means adopted by Oklahoma, the burden of responsibility for what the State failed to do is simply shifted to the shoulders of the ophthalmologist. But the shift is one of naked responsibility alone. The "responsible" ophthalmologist has no right under the statute to select the optician. His patient "must not be directed to any specific optician. . . . He can take it to the optician of his choice" (R. 82-83). And the patient cannot be compelled to return for a check up. Enforcement of the standards each individual ophthalmologist may deem essential to competent dispensing is utterly impossible. "Responsible," therefore, means only that the ophthalmologist can be sued if the dispenser does a poor job; it cannot affect the quality of dispensing, or the qualifications of the dispenser, or the right of incompetents to remain in business, at all. The statutory purpose to further the public welfare is not advanced one whit.

The Oklahoma statute does, however, in the face of the prohibition by this Court in *Douglas* v. *Noble*, *supra*, "impose conditions which have no relation to the applicant's qualifications to practise." It does so with respect both to ophthalmologists and opticians. It conditions the ophthalmologist's practice upon the automatic assumption of an oppressive and arbitrary responsibility for the full effect of any appliances furnished upon his prescription by unlicensed persons totally beyond his control. Any optical supplier anywhere may render the ophthalmologist an insurer of the quality of his dispensing by obtaining physical possession of the prescription. As to the optician, his practice is now totally conditioned upon the issuance of a prescription-license which, by the operation of the statute, may not issue at all: (1) The optometrists, with control of 60% of the public in the market for original eyeglasses, will not issue prescriptions which will merely enable their customers, for subsequent needs, to patronize

a competitor; and the statute does not require such issuance by optometrists;[13] (2) the ophthalmologists, by virtue of the burden mentioned above, will inevitably release fewer prescriptions; and (3) even if prescription-licenses do issue, the chances that they will reach the optician are further diminished by the prohibition that he—unlike the optometrist—may not hold himself out as being qualified to fill them. In sum, the optician's right to continue to practice is subjected to oppressive conditions unrelated to the public welfare.

Such conditions[14] which serve "not to regulate the business, but to preclude persons from engaging in it," *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 279, are the very form of unreasonable and arbitrary interference the Fourteenth Amendment was designed to condemn. "The inevitable practical result of enforcing the act under consideration would be destruction of . . . a kind of undertaking not inherently harmful, but long regarded as useful and meritorious." *Pierce* v. *Society of Sisters of Holy Names*, 268 U.S. 510, 534. The only achievement of the means adopted will be to foment optometric monopoly at the expense of the two specialist groups in the field of visual care. The optometrist already refracts and dispenses for 60 percent of the eyeglass-wearing public. Since he will not voluntarily issue prescriptions and the statute does not compel him to do so, he will by virtue of statutorily conferred leverage gain a stranglehold on all the replacement needs of this group. The opportunity of the optician to

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[13] Compare, for example, the Iowa statute regulating optometrists: "Each such practitioner shall furnish his patient without charge a copy of his patient's prescription." Iowa Code Ann., Sec. 154.9.

[14] It is significant to note that the "State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral," are, in this case, even more remote than the hypothetical examples of license revocation on grounds of redheadedness or divorce posed by Mr. Justice Frankfurter, dissenting in *Barsky* v. *Board of Regents of University*, 347 U.S. 442, 470.

seek their patronage is now foreclosed: they have become a captive group of the optometrists. In the remainder of the market, the optometrist gains an immediate competitive advantage since Section 2 permits only him to hold himself out as qualified to perform the services of an optician. And as patients of the ophthalmologist and optician become patients of the optometrist, the number of refractions performed by the ophthalmologist will continually decrease with more and more patients becoming part of the optometrist's captive group. Thus the seemingly innocent "prescription" and "professional responsibility" create a system which in practical operation will continually expand the position of the optometrist in both examinations and dispensing until monopoly is achieved.

But as stated by Mr. Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 304, in an opinion urging the validity of a state statute: "To grant any monopoly to any person as a favor is forbidden." As otherwise stated in *Smith* v. *Texas*, 233 U.S. 630, 638:

> None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve, and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

In a strained attempt to justify this optometric monopoly, the Attorney General relies on data rarely contained in a prescription and an unenforceable professional responsibility to establish integrity, guarantee qualifications and confer competence and skill in the dispensing of eyeglasses. Apparently recognizing that any benefit from this system was at best remote and speculative, and being unwilling to hang its argument on such gossamer thread, the amicus American Optical Association, Inc., devises a new statutory purpose—more eye examinations—and cites

Roschen v. *Ward*, 279 U.S. 337, to dispose of the case. But the mere mention of some other worthwhile or desirable goal cannot rewrite or save a statute which never had it in mind or could bring it about. The fact is that Oklahoma neither attempted in its statute nor pretends in its brief that eye examinations are the objective. To the contrary the Attorney General has stated that the Act is *not* to be construed as requiring

> that one with corrective eyeglasses who desires a new frame or a duplicated lens must first return to the ophthalmologist or optometrist who previously examined him. This is not so by any language of the Act or by contemplated practice. He may return to his optician who has his prescription on file. He may have his prescription in his personal possession and can deliver the same to any optician of his choice. He may call on an optician who does not have his prescription and the optician may obtain the prescription either from an optician having the same or the examiner who prescribed it (Br. 31-32).

But even if some additional eye examinations might result, remote and speculative effects, intended or incidental, will not support legislation having the oppressive impact of this unique scheme.

2. A Statute Which, Totally Without Standards, Delegates Complete Control of One Occupational Group to Private Persons, Including Many Competitors, Denies Due Process.

Under the language of Section 2 as interpreted by the Attorney General, an ophthalmologist cannot discharge the responsibility imposed upon him by its provisions: he cannot exercise the supervision required to insure that the prescription he has issued has been properly dispensed. But even if the statute were construed to permit the ophthalmologist to select the dispenser of his prescription and upon this power of selection he could erect an effective system of supervision which would not be offensive to his

patients, the statutory scheme would still run afoul of the due process clause as an invalid delegation of unfettered power, without standards, to private persons.

Such delegation operates as follows. Absolute and sole power to issue prescription-licenses to customers is vested in ophthalmologists and optometrists. They may grant or withhold at will. If they grant, in light of their statutory responsibility, they must designate the opticians whom their patients must patronize. Every optician's livelihood is thus contingent upon the licensors' grace.[15] A private system of regulation by referral, with ironclad prohibitions against members of the public patronizing opticians of their own free choice, takes over.

The optometrist's license will not issue: he will not, and is not by the statute so compelled, send a prescription to a competitor when he can and does sell the lenses and frames himself. The ophthalmologist's license, to be sure, will be issued upon his impartial judgment as to which optician is best. In both cases, however, the judgment and standards are private and subjective: there is no administrative board, as in *Barsky* and *Semler*, *supra*, nor any opportunity for judicial review, as described in *Douglas* v. *Noble*, *supra*. The optician to whom no prescription is directed has no forum for appeal or relief.

Such delegation of power to one group to control another has long been condemned:

> [I]t is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . [I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to convey such power undertakes an intolerable and unconstitutional interference

[15] This problem is not present in the case of the pharmacist since the physician is not responsible for the manner in which his prescription is filled. Hence patient selection and not physician designation determines the choice of pharmacist.

> with ... rsonal liberty and private property. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311.

Similar delegations were invalidated by this Court, unanimously, in *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, and *Eubank* v. *Richmond*, 226 U.S. 137. Each involved a delegation to private persons, unfettered by statutory standards, to deny to others the right to make lawful use of their own property. Yet, in the case at bar, in a manner similar to those just cited, "the exclusion" of opticians from the dispensing market "is not indispensable" to the statute's goal. "There is no legislative determination that" the operation of qualified opticians "would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary." Yet the failure of private persons "to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily . . . The delegation of power so attempted is repugnant to the due process clause of the 14th Amendment." *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, *supra*, at 121-122.

The power delegated by Section 2 to licensed practitioners not only individually to establish private and subjective standards for opticians but also to determine which opticians meeting those standards or, indeed, conditions, may remain in business should not be sanctioned by this Court.

CONCLUSION

For generations, the ophthalmologist and the optician have rendered complementary services in the public interest. The specialist in all matters concerning the eye has utilized the specialist in optical dispensing to assure that the public may have the best possible visual care. It is the firm conviction of these Amici that the State of Oklahoma may not constitutionally enact legislation, unrelated to the public welfare, imposing oppressive restrictions on

their respective practices with the inevitable tendency to legislate a vital specialist team out of existence solely for the benefit of an integrated practitioner. For the foregoing reasons these Amici urge that the judgment of unconstitutionality of the court below be affirmed.

Respectfully submitted,

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APPENDIX

The relevant provisions of Oklahoma Enrolled House Bill No. 953 (Okla. Stats. Ann., Title 59, §§ 941-942) are as follows:

> Section 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive th best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another.
>
> Section 2. It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951, to fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951 may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames, or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses.

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IN THE

Supreme Court of the United States

October Term, 1954

No. 184

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al., *Appellants,*

v.

LEE OPTICAL OF OKLAHOMA, INC., ET AL.

On Appeal From the District Court of the United States for the Western District of Oklahoma

MOTION FOR LEAVE TO JOIN AS AMICI CURIAE IN THE BRIEF OF THE GUILD OF PRESCRIPTION OPTICIANS OF AMERICA, INC.

OF THE AMERICAN COMMITTEE ON OPTICS AND VISUAL PHYSIOLOGY; OKLAHOMA CITY ACADEMY OF EYE, EAR, NOSE & THROAT; CALIFORNIA MEDICAL ASSOCIATION; LOS ANGELES SOCIETY OF OPHTHALMOLOGY & OTOLARYNGOLOGY; MEDICAL SOCIETY OF THE STATE OF PENNSYLVANIA CONSERVATION OF VISION COMMITTEE; NEW JERSEY OPHTHALMOLOGICAL SOCIETY; NORTH CAROLINA EYE, EAR, NOSE & THROAT SOCIETY; PACIFIC COAST OTO-OPHTHALMOLOGICAL SOCIETY; PENNSYLVANIA STATE OPHTHALMOLOGICAL & OTOLARYNGOLOGICAL SOCIETY; PHILADELPHIA COUNTY MEDICAL SOCIETY CONSERVATION OF VISION COMMITTEE; READING OPHTHALMOLOGICAL SOCIETY; SAN BERNARDINO MEDICAL SOCIETY; SECTION ON OPHTHALMOLOGY, MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA; SOUTH CAROLINA ASSOCIATION OF OPHTHALMOLOGY.

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MOTION FOR LEAVE TO JOIN AS AMICI CURIAE IN THE BRIEF OF THE GUILD OF PRESCRIPTION OPTICIANS OF AMERICA, INC.

The American Committee on Optics and Visual Physiology; Oklahoma City Academy of Eye, Ear, Nose & Throat; California Medical Association; Los Angeles Society of Ophthalmology & Otolaryngology; Medical Society of the State of Pennsylvania, Conservation of Vision Committee; New Jersey Ophthalmological Society; North Carolina Eye, Ear, Nose & Throat Society; Pacific Coast Oto-Ophthalmological Society; Pennsylvania State Ophthalmological & Otolaryn-

gological Society; Philadelphia County Medical Society Conservation of Vision Committee; Reading Ophthalmological Society; San Bernardino Medical Society; Section on Ophthalmology, Medical Society of the District of Columbia; and South Carolina Association of Ophthalmology hereby respectfully move for leave to join as amici curiae in the brief of the Guild of Prescription Opticians of America, Inc. in this case.

The consents of both parties have already been given to the Guild for filing of its brief, as well as to the American Optometric Association, Inc. In addition, briefs amici curiae have been filed for the States of Arkansas, California, Kansas, and Mississippi.

The consent of the attorney for the appellees to the request of the moving parties has been obtained. The consent of the attorney for the appellants was requested but denied.

The American Committee on Optics and Visual Physiology is composed of representatives from the Section on Ophthalmology, American Medical Association, the American Ophthalmological Society, the American Academy of Ophthalmology and Otolaryngology, and the Association for Research in Ophthalmology. It represents virtually all qualified licensed ophthalmologists throughout the United States. Its purpose and function is to promote the public interest in visual care by coordinating and disseminating information on matters of significance in the science and profession of ophthalmology, and by maintaining the highest professional ethical standards.

The medical and ophthalmological societies listed above represent qualified licensed physicians and ophthalmologists in their respective geographical areas. The Oklahoma City Academy of Eye, Ear, Nose & Throat states that it

> is the only Ophthalmological Society in the State and is made up of members both in and out of Oklahoma City. It is our belief that it represents the opinion of the State ophthalmologists.

Ophthalmology is the medical science and profession devoted to the examination, diagnosis and treatment of all diseases of the eye, including the refraction or measurement of a patient's visual powers and the issuance of prescriptions for corrective lenses. The ophthalmologist is a doctor of medicine qualified by specialized training and experience, and by statute, to treat by means of medicine, surgery and refractive procedures any and all disorders and malfunctions of the human eye.

The moving parties firmly believe in and support state regulation of the field of visual care. They endorse in general the aim of the Legislature of the State of Oklahoma. They object, however, to the manner in which Section 2 of Enrolled House Bill 953, enacted by the Legislature of Oklahoma in 1953, under the guise of promoting the public health and welfare but in fact to the detriment of the medical profession, has advanced not the public's interest in eyesight, but the economic interests of the optometrist. They believe that it is important that the unconstitutionality of Section 2 of the Oklahoma Statute be exposed at this time so that it may not serve as a pattern for the enactment by other states of similar legislation on behalf of optometrists.

Section 2 of the Oklahoma Act makes it unlawful for any person, other than a licensed physician or optometrist,

> "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate . . . or replace into the frames, any lenses"

except as authorized by written prescription from an Oklahoma licensed physician or optometrist,

> "provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person."

By this provision, the Oklahoma Act discriminates against the ophthalmologist, without corresponding benefit to the public, in two distinct ways. First, by its requirement for written prescriptions as prerequisite to the replacement or duplication of lenses and frames, without a corresponding requirement that optometrists issue prescriptions at all, Section 2 tends, without any benefit therefrom to the public interest, directly to force the patients of the ophthalmologist to seek the services of his optometric competitor. Ophthalmological patients may not replace lenses or frames through the optician unless they have retained or can duplicate their prescription. No such limitation exists if the ophthalmological patient goes to an optometrist; he may duplicate lenses by means of the lensometer or fit new frames, all without prescription according to the statute. Thus, the optometrist, who issues no prescription, retains a stranglehold on all his original customers and attracts patients of the ophthalmologist besides.

Second, although all 48 states and the District of Columbia have legislated in the field of visual care, Oklahoma is the only State that legislatively forces the ophthalmologist to be legally responsible and liable for the filling of prescriptions, a process over which he has no effective control. This inability to supervise or fulfill such statutory responsibility flows from the fact that an ophthalmologist can neither dictate the place to which his prescription is taken nor compel the patient to return once the prescription is filled. The ophthalmologist may, to be sure, suggest or recommend a particular optician and, if he desires, may request that the patient come back, but enforcement, as a matter both of law and of ethics, is impossible. Moreover, under the Oklahoma statute the burden of responsibility for the deeds of another falls solely on the ophthalmologist and not at all on the optometrist, for the latter is engaged in his integrated operation of examination plus dispensing. As a consequence of the foregoing, the statute delegates to each individual ophthalmologist in the State of Oklahoma official responsibility, as a licensor, for the standards and

conduct of every optician, as licensee, everywhere. His situation is not unlike that of a physician forced by legislative fiat to guarantee the performance of every pharmacist who fills his prescriptions. The desirable objective of assuring correct filling of prescriptions by opticians can and should properly, as in the case of the pharmacist, be obtained by state licensing of opticians as is now done in at least twelve states. In such event, the public gains and none save those incapable of meeting licensing standards suffer.

The dispensing optician is an essential entity in the field of public eye care. While others now emulate his services, it has been his historical function to complement the services of the eye physician in refractive patient care. It is contrary to the public interest to deny his services to the public and to the practicing ophthalmologist.

For the foregoing reasons the moving parties wish to join in the brief of the Guild of Prescription Opticians of America, Inc. as amici curiae to urge affirmance of the judgment of the court below holding unconstitutional Section 2 of the Oklahoma Act.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1954.

No. 184.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, ET AL., *Appellants,*

vs.

LEE OPTICAL OF OKLAHOMA, INC., ET AL., *Respondents.*

On Appeal from the District Court of the United States for the Western District of Oklahoma.

PETITION OF RESPONDENTS LEE OPTICAL OF OKLAHOMA, INC., ELLIS CARP AND ORAN RIPS FOR A REHEARING.

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PETITION OF RESPONDENTS LEE OPTICAL OF OKLAHOMA, INC., ELLIS CARP AND ORAN RIPS FOR A REHEARING.

Lee Optical of Oklahoma, Inc., Ellis Carp and Oran Rips, respondents in No. 184, present this, their petition, for a rehearing of the above-entitled cause and in support thereof respectfully show:

I.

Petitioners concede that the day is past when this Court will use the Due Process Clause of the Fourteenth

Amendment to strike down state laws regulatory of business or industrial conditions merely because they may be unwise, improvident or out of harmony with a particular school of thought. But where, as here, the uncontradicted evidence establishes that Section 2 in most cases exacts a needless, wasteful requirement of the public and that its effect is to take a major portion of an entire craft's business from it and to transfer that business to a group possessing no greater, and in many cases inferior, qualifications to perform the transferred functions, the statute assumes proportions extending far beyond improvidence or lack of wisdom. Petitioners with all earnestness and sincerity respectfully urge that if due process under the Fourteenth Amendment means anything—if its language imposes any restriction upon a state legislature's enactments—it must prohibit just such a needless, wasteful requirement and the consequent interference with a qualified craft's right to pursue a lawful occupation as is imposed by Section 2 of the Oklahoma Act unless, in fact, some improvement can be shown fairly compensating for the harm inflicted.

The opinion of this Court dated March 28, 1955, in this appeal and in No. 185 holds that Title 59, Oklahoma Statutes Annotated, §942, does not violate the Due Process Clause of the Fourteenth Amendment because the Oklahoma Legislature (a) might have concluded that the frequency of occasions when a prescription for eyeglasses is necessary was sufficient to justify the regulation of the fitting of eyeglasses to the face, (b) might have concluded that in the duplication of lenses a prescription was needed often enough to require one in every case or (c) may have concluded that eye examinations were so critical that every change in frames and every duplication of a lens should be accompanied by a prescription.

The opinion recognizes, however, that Section 2 may exact a needless, wasteful requirement in many cases. The expert testimony establishes beyond any doubt that the requirement is needless and wasteful in the vast majority of the thousands of cases involving the duplication and replacement of eyeglasses and lenses and, in fact, serves a useful purpose, in only a limited fashion, in but a few instances. The evidence is irrefutable that the optician can easily supply new frames, duplicate eyeglasses, or duplicate lenses without reference to a written prescription with the same effect as if a prescription were on hand except under very rare conditions. Each of these rare instances is treated by the medical witnesses as a phenomenon of no practical importance for two reasons: (a) the rarity of the situation is such that it has no significance to the mass of dealings in eyeglasses, and (b) since the sole function of an eyeglass is to correct a refractive error by optics, rather than to treat or alter a physical condition, an eyeglass cannot physically harm the patient even if error be made, and a patient will not wear an eyeglass that does not enable him to see well and comfortably. Not only, therefore, does the evidence incontrovertibly establish that the prescription requirement of Section 2 is needless and wasteful for the vast majority of the people of Oklahoma, but also it establishes that the statute is of only conjectural benefit to a very few Oklahomans and that, on the other hand, it inevitably deprives an ancient and lawful craft of a substantial part of its livelihood.

If, therefore, the Court's premise that the frequency of unusual cases may authorize the legislature to impose hard conditions upon the public and a group of workers be correct, then surely the legislature's conclusions with respect to the frequency of such cases must be based upon

facts, not speculation; for the frequency of cases in which a prescription must contain some data in addition to the power of the lens is a medical fact subject to statistical determination. If, because of the existence of such rare situations, a state legislature may exact needless, wasteful requirements having the effect of expropriating a major portion of the means of livelihood of some of its citizens, then surely the incidence of rarity becomes a factor determinative of the right of the legislature constitutionally to harass the many in order to protect the few. Surely the legislature may not determine to be frequent that which in fact is rare, or determine to be an appreciable hazard that which is insignificant. And if the test of due process is the frequency in occurrence of the evils sought to be eliminated by a state police power measure, then there must be some standard for the relative frequency or incidence of those occasions to determine when due process has been denied. Certainly, an incidence of one in 500 is not the equivalent of one in 100,000 for the purposes of due process.

If such be the constitutional proposition posed in this case, then it is respectfully submitted that the incidence of rarity becomes a significant constitutional fact. Unless the due process clause is eliminated as a means of protecting the public against legislation designed solely to promote the welfare of an infinitesimal few, the incidence of recurrence of the situations promoting the legislation must be determined. And if evidence of mere rarity as proved in this case be not adequate, then it would seem that the case should be remanded to the district court to ascertain statistically the incidence of rarity upon which the legislature acted.

Also, the Court's opinion indicates that Section 2 may be upheld because it may tend to produce a greater

frequency of eye examinations although it is recognized that such examinations are not directly required. However, it would seem that instead the tendency will be greater to produce vast numbers of medically wasteful eye examinations than to induce needed eye examinations, for the customers for duplicate eyeglasses and lenses will certainly be, to say the least, preponderantly persons who are in their opinion seeing well with comfort. Since that is the sole objective and accomplishment of eyeglasses, the majority of such customers will be harassed solely to create a presumably favorable climate for the few to take a step toward their own comfort which they have voluntarily declined to do.

Medical authorities in this case have testified that erroneously fitted eyeglasses are harmless and, in fact, do not present as much threat to the purchaser as a badly fitted pair of shoes, for such shoes can produce physical injury to the feet, whereas eyeglasses cannot physically improve or damage the eye. Fundamentally, therefore, this case is not as strong as would be the hypothetical one of a statute requiring all inhabitants of a state to buy shoes only upon prescription of a chiropodist. Can a state constitutionally require all of its inhabitants to buy shoes only on a doctor's prescription simply because some unknown but minute minority of its citizens should consult a chiropodist and have chosen not to do so? Weaken this hypothetical case by the proposition that, unlike shoes, the citizens who need, but have not, new prescriptions for eyeglasses are not doing themselves any physical harm and by the second proposition that Section 2 does not require, but merely tends to cause, these recalcitrants to obtain an eye examination, and the present case emerges in its true perspective. Surely the public and the opticians whose means of liveli-

hood are thus adversely affected can be protected against such capricious legislation.

Petitioners do not mean to urge upon this Court that the Federal Constitution permits courts to weigh the wisdom of debatable propositions or the relative merit of differing schools of thought. Admittedly, those are subjects lying exclusively within the province of the legislature. But petitioners do urge that a state legislature may not disregard or ignore scientific facts and speculate wildly and erroneously, even though in good faith, as to the desirability of "blank check" prescriptions which are needless and wasteful to the public and disastrous to an entire group of workers, where the sole conceivable merit to the requirement of a prescription is a conjectural improvement in the seeing comfort of a few rare individuals.

II.

In the final analysis the ultimate effect of Section 2 on the optician is no different from the effect of the statute involved in *Wieman* v. *Updegraff*, 344 U. S. 183, on the non-swearing college teachers, for Section 2 denies the optician the right to earn a living in his chosen calling. In the *Updegraff* case the college teachers refusing to take the test oath that failed to include *scienter* as an element, were, under the statute, deprived of their chosen teaching positions in the state institutions. This Court held that constitutional protection did extend to a public servant whose exclusion from his job pursuant to a statute was patently arbitrary or discriminatory. Admittedly, Oklahoma, if it considered opticianry as practiced in that state in need of regulation in order to give its people the best possible visual care, could have enacted a measure prescribing educational and other qualifications for op-

ticians without violating constitutional protections. But Section 2 is not such a measure. Rather it is a law prohibiting anyone other than an Oklahoma licensed optometrist or ophthalmologist from holding himself out to the public as qualified to do acts customarily and historically done by opticians and, by its requirement of a written prescription, having the effect of transferring the optician's business in the replacement eyeglass field to the optometrist, when the optometrist is no better, if as well, qualified in those functions than the optician. Thus the question present in this case is similar, so far as opticians are concerned, to that decided in the *Updegraff* case. The same arbitrary deprivation of a means of livelihood found objectionable in *Updegraff* is presented here, and, in addition, the vice not present in *Updegraff,* that this end is accomplished only by imposing useless, wasteful requirements upon the general public. Petitioners respectfully urge that Section 2 of Oklahoma act more clearly violates due process than did the test oath statute in the *Updegraff* case. Both statutes arbitrarily and capriciously interfere with a citizen's right to follow a lawful calling.

Conclusion.

Petitioners sincerely and conscientiously believe that an important and vital question of constitutional due process is presented by this appeal and this Court's opinion. For that reason, even though they fully recognize that petitions for rehearing rapidly pass into the limbo of forgotten things, they consider it incumbent upon themselves to respectfully urge that a rehearing be granted for the reasons set forth above and that upon rehearing, the judgment of the District Court for the Western District of Oklahoma be affirmed.

Respectfully submitted,

/s/ JOHN M. PHILLIPS

JOHN M. PHILLIPS

/s/ DICK H. WOODS

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April 20, 1955

Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

/s/ JOHN M. PHILLIPS

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/s/ DICK H. WOODS

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